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TEXTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

CITY OF HURON, a Municipal Corporation,

Petitioner,

vs.

T. G. EVENSEN, Trustee,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of the City of Huron, a Municipal Corporation, respectfully shows to this Honorable Court:

A.

SUMMARY OF THE MATTER INVOLVED.

This was an action at law brought in the United States District Court for the District of South Dakota by the respondent against the City of Huron, a Municipal Corporation of the first class of the State of South Dakota, to recover a judgment for an alleged default of the city auditor of the city in certifying delinquent instalments of

special assessments for paving certain streets in the city of Huron.

Pursuant to statute, the city improved certain streets by paving and assessed the cost against the property benefited. Under the South Dakota statute, the contractor could be paid either by issuing special assessment certificates (SD Revised Code 1919 Section 6405) or the city could issue bonds to pay the cost of the improvement. (Chapter 319 SD Sessions Laws 1921).

The city adopted the latter method in this case and sold negotiable bonds for the full amount of the contract price. These bonds were, in no sense, obligations of the city. The security for their payment was not the taxing power of the city but the assessments levied and apportioned against the property benefited.* Following statutory permission, (Ch. 226, S. D. Session Laws 1923) the assessments against the property were divided into ten equal annual instalments, (60).

The alleged liability resulted solely from the claimed default on the part of the city auditor.

The entire bond issue was $27,000. The bonds are dated November 1, 1931 and are in the sum of $1,000 each. The action was commenced in May 1939. The bonds are numbered successively in the order of maturity. The first nine bonds had been paid prior to the commencement of the action. Bonds Nos. 10 and 11 matured November 1, 1935 and the other bonds matured three each year thereafter until November 1, 1940. Bonds Nos. 22 to 27, inclusive, had not matured at the time of the commencement of the action nor at the entry of the judgment. Bonds Nos. 22, 23, and 24 matured November 1, 1939 and bonds Nos. 25, 26 and 27 matured November 1, 1940. At the time of the commencement of the action, the city had collected and paid interest in full on bonds commencing with Nos. 10 to

* The bonds were not debts of the city. Suttor v. Town of Wetonka, 62 S. D. 339, 253 N. W. 64; Gross v. City of Bowdle, 44 S. D. 132, 182 N. W. 629.

27, inclusive, to the first day of May, 1935. No part of the interest maturing and becoming due since that date had been paid at that time and no part of the principal of bonds commencing with Nos. 10 to 27, inclusive, has been paid These bonds are owned by various persons and the plaintiff below was a trustee of seventeen of them. (14).

The question of jurisdictional amount is not before this Court because the petitioner conceded below and concedes here that the plaintiff below came within the scope of the ruling in the case of Bullard v. Cisco, 290 US 179.

Collections from the property benefited have been paid over by the city as received and have not been sufficient to make any payments other than those which the city has made. From a balance on hand at the time of the commencement of the action and collected subsequent to that time, the city has paid to the plaintiff below for pro rata distribution among the seventeen bondholders whom he represents, the sum of $2,125.00 which has been credited on the amount alleged to be due under a stipulation that this should be without any prejudice to the rights of either the plaintiff or the defendant.

The procedure resulting in the levy of the special assessments against the property benefited is not challenged. The findings of the trial court are to the effect that all proceedings leading up to the issuance, execution and delivery of the bonds were regular (53).

The trial court entered judgment against the city for the full amount of the principal of the unpaid bonds plus accrued interest and less the meantime partial payments. (64-65). The Circuit Court of Appeals on appeal affirmed this judgment. (75-80). The theory upon which the action was brought, and followed by the trial court and the Circuit Court of Appeals, was that there were defects in certifying the delinquent instalments for the years 1932 to 1936.

In those years, the city auditor certified the instal-

ments that were delinquent in a form of certificate (38-40-41-42-43-44) that contained all of the information required by the applicable statute, Chapter 187 SD Session Laws 1929. This statute provides as follows:

> "It shall be the duty of the city auditor or town clerk, between the fifteenth day of September and the first day of October in each year, to certify to the county auditor of the county in which such municipality is located, or if located in more than one county, to the county auditor of the county in which the property assessed is located, all special assessments remaining unpaid, which became delinquent on or before the fifteenth day of September of that year. In certifying such special assessments, the city auditor or town clerk shall specify the consecutive number of the assessment, as shown by the tax book in his office, the original amount of the assessment, or installment thereof, so certified, the amount of the interest and penalty thereon to the fifteenth day of September of that year, the name of the person in whom the title to the property rests, as shown by said tax book, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was made, and it shall be the duty of the county auditor and county treasurer to proceed, with reference to such assessment, as provided in Section 6797."

Section 6797 S. D. Rev. Code 1919 requires the county auditor to certify the matter certified to him to the county treasurer, who makes sale of the property at the annual tax sale.

In those years, however, instead of certifying the delinquencies to the county auditor as required by this statute, he certified them direct to the county treasurer. The county treasurer, in 1935, sold the properties certified to him that were listed as delinquent that year and the purchaser was Beadle County, the county in which the City of

Huron is located (62). Subsequent and prior certifications of delinquent instalments have included substantially the same property. There have been some redemptions and a few additional pieces have been certified. (45-52). In 1937 and 1938, certifications by the city auditor were to the county auditor (43-61).

The respondent in this court made no proof of damages whatsoever at the trial but rested his case in the trial court and in the Circuit Court of Appeals upon the proposition that upon the mere proof of a default or error in certification by the city auditor of delinquent instalments the city would become liable for the full amount due upon the bonds.

B.

STATEMENT OF THE BASIS OF THE COURT'S JURISDICTION

1. This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Eighth Circuit by virtue of the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 228, Section 1, 43 Stat. 938 (28 USC Sec. 347 (a), and under the same act, Ch. 229, Section 8, 24 Stat. 940 (28 USC 350) and under Paragraph B, Section 5, Rule 38, Revised Rules of the Supreme Court of the United States adopted February 13, 1939, effective February 27, 1939. Federal jurisdiction is based upon diversity of citizenship. (1).

2. The date of the judgment of the Circuit Court of Appeals to be reviewed is July 9, 1940. (80). Appended hereto is a copy of the opinion of the Circuit Court of Appeals. (Appendix 1). On July 31, 1940, a rehearing was denied by the Circuit Court of Appeals (89).

This petition for certiorari and the certified transcript of the record are being filed in this court within three months of the date of the judgment.

3. This is a proper case for the exercise by this court of its power of review. Erie R. Co. v. Tompkins, 304 US 64; Revised Rules of the Supreme Court of the United States adopted Feb. 13, 1939, Rule 38, 5 (b); Magnum Import Co. v. Coty, 262 US 159, as will be more fully amplified in the brief in support of this petition. The judgment of the Circuit Court of Appeals is in conflict with the statutes of South Dakota pertaining to damages (Secs. 1957, 1959, 1966, 1984, 2003 SD Revised Code 1919); it is contrary to the established rule of this court, Moore v. City of Nampa, 276 US 536, and is also in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit on the same question, Gray v. City of Santa Fe (CCA10) 89 F(2) 406.

C.

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals for the Eighth Circuit err in holding that the certification by the city auditor directly to the county treasurer was more than a mere irregularity and not such a procedural defect as to affect the lien for the special assessment, sales held by the county treasurer pursuant to such certifications, or the liability of the property to respond therefor?

2. Did the Circuit Court of Appeals for the Eighth Circuit err in holding that certification by the city auditor directly to the county treasurer was more than a mere irregularity and was so substantial as to make the city liable in damages?

3. Did the Circuit Court of Appeals for the Eighth Circuit err in holding that upon proof of a defective certification or an error in certification, without more, the city was liable in substantial damages, to the amount of the face of the bonds unpaid with interest thereon?

4. Did the Circuit Court of Appeals err in not holding that the plaintiff below had failed to prove more than nominal damages?

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals holding that the certification by the city auditor direct to the county treasurer was a substantial breach of the bonds, and made the city liable for the full amount of the bonds, principal and interest then unpaid, was in conflict with the decisions of this Honorable Court, the Circuit Court of Appeals for the Tenth Circuit, and with the statutes of the State of South Dakota, and the decisions of the Supreme Court of that state.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 11687 At Law, City of Huron, a municipal corporation, appellant, vs. T. G. Evensen, Trustee, appellee, and that the said judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

CITY OF HURON, a Municipal Corporation,
Petitioner,

MAX ROYHL
GEORGE E. LONGSTAFF,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

A.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is not yet reported but is appended hereto as Appendix 1. The District Court rendered an opinion on motion to dismiss which is found in the record at P. 23. Its findings of fact and conclusions of law on trial appear in the record at Pages 52 to 64.

B.

Statement of the Case.

A sufficient statement of the case has been made in the petition and in the interests of brevity will not be repeated at this point.

C.

Assignment of Errors.

Petitioner assigns as errors the ruling of the Circuit Court of Appeals for the Eighth Circuit upon the questions set forth in the petition.

D.

ARGUMENT.

Point I.

CERTIFICATION OF DELINQUENT INSTALMENTS OF THE SPECIAL ASSESSMENTS DIRECTLY TO THE COUNTY TREASURER WAS A MERE IRREGULARITY, NOT AFFECTING IN ANY WAY THE OBLIGATION OF THE TAXPAYER TO PAY, THE DUTY OR OBLIGATION OF THE COUNTY TREASURER TO SELL OR THE LIEN OF THE SPECIAL ASSESSMENT AND WAS IN NO WAY PREJUDICIAL TO THE BONDHOLDER.

Point II.

THE PROPERTY OWNER HAS NOT ESCAPED FULL LIABILITY FOR PRINCIPAL AND INTEREST BECAUSE OF THE 1935 SALE, HENCE BONDHOLDERS HAVE NOT SUFFERED ANY DAMAGE.

Point III.

ON NO THEORY HAVE MORE THAN NOMINAL DAMAGES BEEN ESTABLISHED ACCORDING TO THE STATE RULE AND THE RULE OF THE TENTH CIRCUIT.

I.

CERTIFICATION OF DELINQUENT INSTALMENTS OF THE SPECIAL ASSESSMENTS DIRECTLY TO THE COUNTY TREASURER WAS A MERE IRREGULARITY, NOT AFFECTING IN ANY WAY THE OBLIGATION OF THE TAXPAYER TO PAY, THE DUTY OR OBLIGATION OF THE COUNTY TREASURER TO SELL, OR THE LIEN OF THE SPECIAL ASSESSMENT AND WAS IN NO WAY PREJUDICIAL TO THE BONDHOLDER.

The city was not liable for any default of the county officers charged with the duty of making sale. The City of Winner v. Kelley (CCA8) 65 F (2) 955; Grand Lodge v. City of Winner, 63 SD 390, 259 NW 278. Default of the county treasurer in making sales in any particular year may therefore be disregarded and the question is whether the city auditor substantially complied with the law requiring him to certify instalments that were delinquent each year. That he did certify them each year admits of no doubt. He made out a proper certificate. It contained all of the information the statute required. (61, 38, 40, 42, 43, 44).

From 1932 to 1936, inclusive, instead of taking his certified list of delinquent instalments to the county auditor for him to turn over to the county treasurer with his certificate attached, he gave them directly to the county

treasurer. The county treasurer took the certified delinquencies as properly certified to him and in one year made a sale of the property so certified. (62, 42). He, the responsible officer, charged with this important duty, made an administrative construction that the act of certification was regular and proper and this administrative construction is not to be disregarded. Administrative construction is recognized by the courts as aiding in the interpretation of statutes. Badger v. Hoidale (CCA8) 88F (2) 208; US v. Madigan, 300 US 500.

The question is one fundamentally of interpretation of a statutory scheme and reaches far into the spirit written into the statutory plan.

The statutes of the state will now be turned to in an effort to gain from them the legislative attitude toward the statutory act of certification.

The pertinent statute clearly requires the body of the South Dakota statutes to be examined for after indicating the duty of the county auditor and the county treasurer with reference to certifying and collecting delinquent special assessments, it provides as follows:

> " * * * Sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the county treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales." (Sec. 6797 S. D. R. C. 1919).

The statutes of South Dakota indicate beyond the possibility of any doubt that the act of the county auditor in certifying to the county treasurer delinquent special assessments or his failing to certify them and the act of the county treasurer in accepting as conclusive upon him a certification from the city treasurer is a mere irregularity and is a defect not in any way invalidating sales made by the county

treasurer, if he makes sales, or lessening his duty to sell if he accepts the certification of the city auditor without protest or objection.

Section 6402 of the S. D. Revised Code of 1919, as amended by Chapter 187 of the S. D. Session Laws of 1929, makes it the duty of the city auditor between the 15th day of September and the 1st day of October in each year to certify to the county auditor of the county in which a municipality is located all special assessments remaining unpaid which became delinquent on or before the 15th day of September of that year.

The statute then provides:

> "In certifying such special assessments, the city auditor or town clerk shall specify the consecutive number of the assessment, as shown by the tax book in his office, the original amount of the assessment, or instalment thereof, so certified, the amount of the interest and penalty thereon to the fifteenth day of September of that year, the name of the person in whom the title to the property rests, as shown by said tax book, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was made, and it shall be the duty of the county auditor and county treasurer to proceed, with reference to such assessment, as provided in Section 6797."

Section 6797 of the S. D. Revised Code of 1919 provides as follows:

> " * * * it shall be the duty of such auditor to immediately certify the same to the county treasurer, and such delinquent special assessments shall be collected by the county treasurer, by sale of the lots or parcels of land so assessed at the next succeeding sale of real property for delinquent taxes, in the same manner and at the same time and place. All real property sold for such delinquent special assessments and not

redeemed shall be entered by the county treasurer upon the duplicate tax lists of the county for the succeeding years, and noted upon all duplicate tax receipts for such real property; and it shall be the duty of the county treasurer to add to the amount of each special assessment so certified interest at the rate of one per cent per month, and ten cents on each lot or parcel of ground for costs of advertising and no other costs or penalties shall be added except as provided by law for certificate of sale, deed and acknowledgment. Sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the county treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales."

Chapter 187 of the S. D. Session Laws of 1929 above quoted from makes the city auditor the source of all the information given to the county officials. Until an assessment or an instalment is delinquent, the county officers have nothing to do with collection and may even be entirely ignorant of the existence of any certain special assessment lien against any property in the city. When the city auditor certifies, he specifies the consecutive number of the assessment as shown by the taxbook in his office; the original amount of the assessment, or instalment thereof; the original amount of interest and penalty thereon until September 15 of that year, the name of the person in whom the title to the property rests, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was levied. It is upon this information which is certified to him that the county auditor would act; in fact, the county auditor would do no more than pass on to the county treasurer what had been certified to him. The county auditor has no power of amendment or correction of the return of the certificate or report of the city auditor. He merely transmits. He is a

conduit. He even makes no record in his office or is not required to make any record in his office. In sharp distinction from this situation, it is the duty of the county auditor with reference to general taxes, to fix the rate percent and to extend the taxes. Special assessments are specifically exempted from this provision. Section 6752 S. D. Revised Code of 1919. This statute provides as follows:

> "**Extension, Apportionment.** All county, township city, town and school taxes, **except special assessments in cities and towns,** shall be levied or voted in specific amounts, and the rate per cent shall be determined from the total valuation of the property as equalized by the tax commission each year. The rate per cent of all such taxes shall be calculated and fixed by the county auditor, in mills and tenths or hundredths of mills, within the limitations prescribed by this code, and all county, township, city, town and school taxes, **except special assessments in cities and towns,** shall be extended by the county auditor; provided, that if any county, township, city, town or school district shall return a greater amount than the prescribed rate will raise, the county auditor shall extend only such amount of tax as the prescribed rate will produce: Provided, that after the county auditor has calculated and fixed, in mills and tenths or hundredths of mills, the rate per cent of all taxes for county, township, city, town or school districts, as in this article provided, he may extend the same upon the tax lists, including the state tax levies, as one amount under the heading "Total Consolidated Tax," which, when collected, shall be apportioned by the county auditor and treasurer at the end of each month to the state, county, township, city, town or school district for which it was levied and be paid to such state, county, township, city, town or school district, as a total amount. Such amount when received by the state, county, township, city, town or school district shall be by the treasurer thereof apportioned to the various

funds that were authorized to be levied for the current year." (Emphasis supplied).

After general taxes are levied, the county auditor makes out a tax list for each assessment district containing the following information:

"1. A list in alphabetical order of all natural persons and corporations in whose name any property other than real property has been listed, with the valuation thereof.

2. A list of the taxable lands in the district, not including the city and town lots, with the valuation thereof.

3. A list of the city or town lots in each city or town in or composing such district, with the valuation thereof.

The county auditor shall foot each and every column of taxes, and prove the same so that they shall aggregate the same as the footing of the column of total taxes, and shall recapitulate the same. Such recapitulation shall show the total amount of taxes for each specific purpose for which a levy has been made, and the aggregate of such taxes upon the lands, city and town lots and personal property, separately." **Sec. 6754, S. D. Revised Code of 1919.**

Section 6755 of the S. D. Revised Code of 1919 provides that when the tax list is completed, a duplicate is given to the county treasurer by the county auditor on or before the first day of January of each year. The statute is as follows:

"**Duplicates, How Made—One to Treasurer.** The tax list when completed shall be kept by the county auditor as the property of the county. The county auditor shall also prepare a duplicate of the tax lists of his county, and shall also insert in such duplicate tax lists, in a separate column, that portion of the tax to be collected for state purposes, including the levies

for rural credits and state highways, such figures to be for the use of the treasurer in showing the amount of such state taxes upon tax receipts. He shall also deliver the same to the county treasurer on or before the first day of January following the date of the levy for the current year, and the county treasurer shall immediately upon receipt of such duplicate tax lists, specify, in a column for that purpose, the years for which any of the real property described therein has been sold for taxes and not redeemed."

Section 6757 of the S. D. Revised Code of 1919 provides that the county auditor shall, immediately after delivering such duplicate tax lists to the county treasurer,* charge him with the amount of the lists so delivered to him as shown in the recapitulation thereof in a book prepared for that purpose and all additional assessments made after the lists are delivered and shall credit him with amounts collected and deducted. The language of Sec. 6765 S. D. Rev. Code 1919 is as follows:

"**Duplicate Receipts, Contents.** Whenever any taxes are paid to the county treasurer, he shall make out duplicate receipts for the same, one of which shall be delivered to the person paying such taxes and the other shall within one week be filed by the treasurer with the auditor, and such duplicate receipt shall specify the land or other property on which such tax was assessed according to its description on the tax duplicate or in some sufficient manner, and shall also specify in a separate line or column on the face thereof the amount of taxes collected for state purposes, including the levies for rural credits and state highways, and shall also specify in separate lines or columns the amount of each separate and distinct fund as extended upon the tax duplicate. Such duplicate receipts shall also specify the years for which any of the real

* The county treasurer is the collector of taxes. Section 5925 Revised Code 1919; Sec. 6762 Rev. Code 1919.

property described therein has been sold for taxes and not redeemed, unless the certificates for such tax sales are more than six years old. All tax receipts issued by the county treasurer shall be bound in books of convenient size and numbered consecutively, commencing with number one on the first receipt issued for the taxes for any one year, and he shall not receipt for more than one year's taxes on the same property in one tax receipt, nor shall more than one series of numbers be used for any one year's taxes, but a separate and distinct series of numbers of receipts shall be kept and issued for the taxes of each year for which the same have been levied and assessed. Any county auditor who fails to enter, as in this section provided, the amount of taxes for state purposes, or any county treasurer who fails to specify the same upon the face of a duplicate tax receipt, shall be guilty of a misdemeanor."

The auditor's duties on receipt of the duplicate tax receipt are enumerated in Sections 6767 and 6768 S. D. Revised Code of 1919 in the following language:

"**Auditor Audits Receipt.** It shall be the duty of the auditor, on receiving any duplicate tax receipt from the treasurer, forthwith to examine the same and compare it with the tax list in his possession and see if the total amount of taxes and the several amount of the different funds are correctly entered and set forth in such receipt, and in case it shall appear that the treasurer has not collected the full amount of taxes and interest which according to the tax list and the terms of the receipt he should have collected, the auditor shall forthwith charge the treasurer with the amount such receipt falls short of the true amount, and the treasurer shall be liable on his official bond to account for and pay over the same." (Sec. 6767).

"**Payment Noted on Tax Lists.** Whenever any

taxes are paid the treasurer shall write on the tax duplicate, opposite the description of the real estate or the property whereon the same were levied, the word "paid," together with the date of such payment and the name of the person paying the same, and the county auditor, on receiving the duplicate receipt, shall forthwith makes the same entries on the tax list in his possession." (Sec. 6768).

As to property omitted from the assessment books when they are returned to him by the assessors of the various taxing districts, the duty of the county auditor is as specified in Section 1 of Chapter 110, S. D. Session Laws of 1919:

> "Section 1. Whenever the County Auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has from any cause been omitted, in whole or in part, in the assessment of any year or number of years, he shall proceed to correct the assessment rolls and add such property thereto, with the valuation."

The distinction in duties and responsibilities is clear. As to general taxes, the county auditor is a responsible official charged with a vast amount of detail, charged with keeping records, and charged with the duty of keeping a full and complete account with the county treasurer. No such duty is found to exist as to special assessments levied by a city. The county auditor is through when the certified record of the city auditor has passed through his hands to the county treasurer. In further distinction, the county treasurer, according to the provisions of Section 6797 S. D. Revised Code 1919, collects the assessments by sale of lots or parcels of land and he enters upon the duplicate tax lists of the county, all sales of real property for delinquent special assessments from which there is no redemption and makes note of that upon all duplicate tax receipts. He adds to the amount of each special assessment to certified interest and 10c on each lot or parcel of ground for costs of ad-

vertising. Sales of property according to this section are to be conducted in the same manner as are the tax sales made by the county treasurer.

Since the intent of the legislature, as found in a statutory scheme is being sought, the certificate of the county auditor attached or affixed to delinquent assessments or instalments certified to him by the city auditor must be likened to the warrant to the treasurer to collect general taxes.

The law of South Dakota provides that when the county auditor has prepared tax lists, after the tax levy is made, he shall deliver a duplicate of the lists to the county treasurer. Sections 6754 and 6755 S. D. Revised Code of 1919.

It further provides in Section 6756 of the S. D. Revised Code of 1919 as follows:

> "**Warrant to Treasurer to Collect Taxes.** The county auditor shall attach to each tax list his warrant, under his hand and official seal, in general terms, requiring the county treasurer to collect the taxes therein levied according to law; but no informality as to the requirements of this section shall render any proceeding for the collection of taxes illegal."

No informality in the warrant from the county auditor to the county treasurer will vitiate the proceedings taken or defeat the collection of general taxes. No amount of reasoning can convince that there should be any distinction in this respect between the certification of general taxes to the county treasurer by the county auditor and certification to the county treasurer of delinquent special assessments which have been certified by the city auditor. The South Dakota statutory plan may be summarized by saying that the intent is that all informalities and irregularities not going to matters of substance such as the very right to collect the tax or a special assessment must be disregarded. The liability on the part of the assessment payer or taxpayer remains the same as if the statute had been

carried out to the fullest extent of all of its literal requirements.

The formal and insubstantial nature of the act of the county auditor in certifying is emphasized when it is considered that he would act in a purely ministerial manner in attaching his certificate to the city auditor's certified return. He could not pass upon the validity of anything therein contained. In Smyth v. State (Ind.) 62 NE 449, the question of the nature of the acts of an officer pertaining to special assessments was considered and the discussion is pertinent as is shown by the following quotation:

> "Was it sufficient as a return for the auditor? The duties of a county auditor are purely ministerial. He has no judicial function; no right to decide what he shall do or leave undone. The law specifically directs the things he shall do, and grants him no power to change, modify, or omit any of the acts commanded of him. It is his duty to record the proceedings of the board of commissioners, and in free gravel road cases to enter upon the record the report of the committee appointed to apportion the cost of the improvement, showing how the estimated expense has been apportioned upon the lands ordered to be assessed as the same has been confirmed by the commissioners; and he shall place the assessments so made by him upon a special duplicate, to be provided by him at the expense of the county. Section 6860, Burns Rev. St. 1901. Under this statute, when the commissioners have considered the report, and decided that the apportionment of the expense has been fairly and equitably made, and have confirmed the same, it eo instanti becomes the plain and unequivocal duty of the auditor to spread said report upon the record, and to place said assessments, not stayed by judicial process, upon a duplicate for collection."

Irregularities do not deprive such proceedings of their validity. Informalities are to be disregarded.

In Parker v. Challiss 9 Kan. 155, Mr. Justice Brewer, later of the Supreme Court of the United States, said:

> "The other objections raised by counsel for defendant in error relate to irregularities in the proceedings to collect the tax. These irregularities, if any existed, (and we express no opinion either way upon these points,) cannot be inquired into in this injunction proceeding. * For, the power to do the work being given by law, and the work being done, equity will not interfere to relieve the lot owner from the payment of the cost simply on account of irregularities in the proceedings to collect."

Another example of an irregularity where the statute was not literally complied with is found in the case of Oklahoma City v. Vahlberg (Okla) 89 P. (2) 962, in which the Court held that:

> "where published notice of tax resale designated ad valorem taxes by '11-35' and directly thereunder was listed paving assessments sold at original sale with no date following, the abbreviation '11-35' would be deemed to refer to November 1935, and to the sale for both ad valorem taxes and paving assessments, and there would be deemed to have been substantial compliance with statute requiring notice of sale to contain statement of date on which realty was sold to county for delinquent taxes."

When there is an omission in proceedings to collect, when statutes have not been fully complied with, the question to be asked is whether any substantial injury has been suffered by the property owners. That, at least, is the modern doctrine.

Even, as respects the original assessment proceedings, the very foundation of the special assessment levy, the present tendency is to inquire whether the property owner has suffered any loss. In State, ex rel v. Mayor (Wis.) 77 NW 167, the court said:

"It would not be going very far to say that the acts of the council and board in this regard were substantially a compliance with the charter requirements, and gave jurisdiction of the proceedings; but, whether this be so or not, it certainly does not appear, either by the averments of the petition or by the facts set forth in the return, that the relator has suffered any injury by reason of the defects in the proceedings, or that he has paid one cent more than his property ought to be charged for the construction of the sewer. The tendency of legislation and of decision is more and more to require property owners who are contesting taxation, either general or special, to pay, as a primary condition of any relief, such part of the tax as is equitable and just, notwithstanding there may serious irregularities in the original levy."

Mere irregularities, it is often said, do not invalidate proceedings pertaining to special assessments. City of Superior v. Simpson (Neb) 209 NW 505; Munsell v. City of Hebron (Neb) 220 NW 289; Biggerstoff v. City of Broken Bow (Neb) 198 NW 156; Hackney v. Elliott (N. D.) 137 N. W. 433.

The question of irregularity or fundamental defect may be approached from another angle but with like result. The property owner has not escaped liability for principal or interest. The statutes of South Dakota make the lien assessed for the improvement an everlasting lien. The statutory provision is embodied in Section 6403 Revised Code of 1919 as follows:

"All special assessments lawfully levied upon real property in any municipal corporation are a perpetual lien thereon as against all persons or bodies corporate, except the United States and this state, from the date of the filing of the certified copy of the assessment roll in the office of the city or town treasurer, as provided in Section 6400."

A perpetual lien is one which remains in force until

it is paid or extinguished n some legal manner. State v. Day County, 64 SD 370, 266 NW 726. The lien of the assessment is prior to any pre-existing lien as by mortgage, Kirby v. Waterman, 17 SD 314, 96 N. W. 129, and, of course, subsequent liens are inferior to it.

So the property owner has gained nothing by any irregularity in the procedure. The lien and interest thereon remains as a charge against his property.

Further, when a certified statement is required from an officer for the purpose of information, such certified statement is not a jurisdictional prerequisite and a failure to follow the statute is at the most a mere irregularity. In Re City Comptroller (Minn) 76 NW 259. In this case, the Supreme Court of Minnesota said:

> "A provision of the law so indefinite as is the one in question, merely requiring that a 'certified statement' shall be 'made up' by the comptroller as to what assessments remain unpaid and delinquent, and which statement need not be filed with or presented to the court until the very moment application is made for judgment, cannot be held to be of a jurisdictional character in any strict sense. * * * While the statements presented by the comptroller when applying for the judgments in question may not have been properly certified to, and may have been defective in some respects, all that would have appeared if the statute had been literally complied with was before the court in other papers filed by the comptroller at the same time, and the court was fully informed in the premises. All of the statutory requirements on which depended the right to enter judgment had been observed, and, at most, there was a mere irregularity in the mode of procedure when the comptroller failed to certify as to some matters which, at the same time and in other documents filed by him, were made to appear."

The act of certification by the city auditor or by the

county auditor is informative only, and is not in any way decisive or determinative of the obligation of the property owner. The statute is purely directory, and failure to comply with its requirements merely an irregularity because its words do not include a negative importing that the act shall not be done in any other way. All of such facts have been held by the Supreme Court of South Dakota to indicate that literal compliance with the statute is not required, and failure to follow it as written is a mere irregularity. In Mallery v. Griffin, 43 S. D. 71, 177 N. W. 818, it quoted from French v. Edwards, 13 Wall. 506, to the effect that statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, did not limit their power or render its exercise in disregard of the requisitions ineffectual, which included " 'regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected'." Further quoting from this case, the court said: " 'Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizens, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory.' " In the same case, quoting from the Supreme Court of Alabama in State Auditor v. Jackson County, 65 Ala. 142, the court said:

" 'We concur in opinion with the Supreme Court of the United States, that those legislative directions which have for their object the protection of the taxpayer against spoliation or excessive assessment, must be treated as mandatory. But, if there be enough to show that the assessment is so made and evidenced as to be understood, then regulations designed for the information of the assessor, or other officer, intended to promote dispatch, method, system and uniformity in modes of proceeding, are merely directory.' "

The words of the statute are "It shall be the duty of the city auditor * * * * to certify * * * * * " (Ch. 187, Laws of 1929). The statute is designed to secure a system and dispatch in the proceeding. There are no words to negative any other effective method of conveying information to the county treasurer. There is no question of protection of the assessment payer against spoliation or excessive assessment in the question of certification. Thus, all the tests laid down by the Supreme Court of South Dakota for determining, in a tax case, whether an official act required is mandatory or not, or whether a compliance that does in substance what a literal compliance would do is sufficient, are met in this case.

The failure of the county auditor to certify to the certified statement furnished by the city treasurer is no more than an irregularity because information which the county auditor was powerless to change in any manner was fully conveyed by the certified statement of the city auditor to the county treasurer, the ultimate official, whose action was binding and decisive.

From the inevitable conclusion that the plaintiff below proved a mere irregularity, and no more, follows necessarily the further conclusion that the failure of the county treasurer to make a sale in any of the years prior to or subsequent to 1935 is not a default chargeable to the city. City of Winner v. Kelly (CCA8) 65 F (2) 955, Grand Lodge v. City of Winner, 63 SD 390, 259 N. W. 278, supra, Page 9.

The cases upon which counsel relied below and upon which the courts below relied and which will undoubtedly be stressed before this court on appeal are cases from the Eighth Circuit, City of McLaughlin v. Turgeon, 75 F (2) 402, and City of Canton v. Tinan, Receiver, 104 F (2) 961, in which there was no certification for a period of years. Such cases distinguish themselves so readily that further comment is unnecessary. There is a distinction between a failure to act and a defective execution that is plain and is not to be denied.

"It is an immutable rule that a nonexecution shall never be aided," (Sugden, Powers, p. 392) but an attempt to execute will be aided by a court of equity, if defective in form, as in the case of an execution by will of a power which is exercisable only by deed, equity will give aid to such defective execution. (Coats v. Lunt, 210 Mass. 314, 96 N. E. 685).

The act of the city auditor in making direct certification was but defective execution, and was not a case of utter nonaction, such as was presented in the City of McLaughlin and City of Canton cases, **supra.**

II.

THE PROPERTY OWNER HAS NOT ESCAPED FULL LIABILITY FOR PRINCIPAL AND INTEREST BECAUSE OF THE 1935 SALE, HENCE BONDHOLDERS HAVE NOT SUFFERED ANY DAMAGE.

If there was a technical irregularity in the certificate of the city auditor, it would still have been the duty of the county treasurer to make a sale of the property. He could not remain inert and take a proper certificate, even though not in exact compliance with statute. If he refused to sell, his failure or refusal to make a sale in any particular year, would be no default of the city, and the city would not be liable for his acts of omission. City of Winner v. Kelley (CCA8) 65 F (2) 955; Grand Lodge v. Winner, 63 S. D. 390, 259 NW 278. The city could not act to protect the bondholders by making a purchase at any sale. **Idem.** If the contention be that the certification direct to the county treasurer was more than an irregularity, it still remains that the bondholders have lost nothing. The default for purpose of argument may be construed as a serious irregularity which might, in some cases, result in some liability. It cannot be construed, however, as an utter failure to certify. There was, what might be termed, a **de facto** certification. According to the allegations of the complaint, the property covered by the delinquent and unpaid

special assessment certificates was offered for sale by the county treasurer in the year 1935 for the fourth installment which became delinquent in the year of 1934. This appears in the complaint, Paragraph 11. (11). It also appears in the findings. (62). The property was sold to Beadle County, South Dakota, and there was no other bidder therefor;* the county will be entitled to a deed if there is no redemption from the sale in four years from date of sale, Chapter 248, Session Laws of 1937.

No attack is made upon the assessments. The plaintiff recognizes their regularity in all respects, as to amount and procedure. This appears in the findings. Paragraph 4. (53).

It must be taken then as conclusively admitted and established that no successful attack could be made by any person, property owner, or otherwise, upon the assessments, either as to amount or procedure. Equitably, each property owner therefore has had a proper adjustment and assessment of benefits as to his particular piece of property. That being true, the property owner, if he attempted to assail the validity of the proceedings in 1935, under which his property was sold, or if he permitted the county to take deed under those proceedings, and attempted to attack the deed, would be met with the equitable rule obtaining in South Dakota by statute and decision that he must pay the amount of all delinquent assessments into Court before he could be heard or at least before judgment would be entered in his favor setting aside the sale or deed. The rule referred to is embodied in Section 6412, Revised Code of 1919:

> "No injunction restraining the making of any local improvement under the provisions of this chapter shall be issued after the letting of the contract therefor; and whenever any action or proceeding shall

* The county was obliged to bid the whole amount of principal, interest and costs due. Sec. 6787, amended by Chapter 197, Session Laws of 1933; Secs. 6792 and 6794, R. C. 1919.

be commenced and maintained in any court to restrain the collection of any assessment levied for any municipal local improvement, to recover any such assessment previously paid, to recover the possession or title of any real property sold for such an assessment, to invalidate or cancel any deed or grant thereof for such an assessment, or to restrain or delay the payment of any such assessment, the true and just amount of such assessment due upon such property must be ascertained, and judgment rendered property making the same a lien upon the property and authorizing execution or process to issue for the collection thereof by a sale of the property."

This rule is not only statutory in the state of South Dakota but is a rule applicable generally in cases of this kind, by virtue of the equitable powers residing in its courts. Pettigrew v. Moody County, 17 SD 275, 96 NW 94. In that case an action was brought to enforce an equitable right to have certain voidable tax proceedings for the year 1898 cancelled and set aside as to certain real estate. The property was conceded to be subject to taxation. The trial court entered an unconditional decree nullifying all proceedings and restraining the defendant County from asserting a lien under the tax sale proceedings. The Court conceded that the assessment and all subsequent steps taken by the taxing officers were illegal and void. It reversed the trial court upon the ground that the decree was erroneous because the Court had not ascertained the true and just amount of taxes due the purchaser at tax sale. The Court said that the statute providing for such payment by the one seeking to set aside the tax sale was "consonant with equitable doctrine. That an applicant for relief in a case of this character must invariably pay the actual amount of taxes chargeable against his property." In arriving at its decision, the court said:

"In Clark v. Darlington, 11 S. D. 418, 78 N. W. 997, we say: 'It has been the policy of the people of this

state and of the former territory to require the payment of taxes on all real property subject to taxation, and hence they have provided that, whenever any action or proceeding shall be commenced to invalidate or cancel any deed or grant for taxes, it shall be the duty of the court to ascertain the true and correct amount of taxes due upon such property, and render judgment therefor.'

"It being made the duty of the court, both by statute and in equity, to ascertain and adjudge the correct amount of taxes to be paid by the owner, it is not even necessary to tender the amount justly recoverable. Campbell v. Equitable Loan and Trust Co., 14 S. D. 483, 85 N. W. 1015. In a North Dakota case of this character, where the person making the assessment was without even colorable authority to act, and all subsequent proceedings were fatally defective, it was held, in construing section 1643, supra, that relief can be granted only upon condition that plaintiff pay the just amount of taxes for which his property is liable, and that such a judgment in no manner depends upon a request therefor by either party, because the statute was enacted for the protection of the public revenue, and is mandatory in the requirement that 'the true and just amount of taxes due upon such property or by such person must be ascertained, and judgment must be rendered and given therefore against the tax payer'."

Other cases which follow the same doctrine in South Dakota are: Berry v. Howard, 33 SD 447, 146 NW 577; Salmer v. Clay County, 20 SD 307, 105 NW 623, Rosekrans v. Wagner, 29 SD 181, 135 NW 681; Campbell v. Equitable Loan and Trust Co. 14 SD 483, 85 NW 1015.

This sale is adequate and effective to establish the lien of all prior unpaid assessments (Sec. 6794 Rev. Code of

1919*) and of all subsequently accruing assessments **(Idem)**. Section 6794 provides:

> "The county treasurer is authorized at all tax sales made under the laws of this state, in case there are no other bidders offering the amount due, to bid off all or any real property offered at such sale for the amount of taxes, penalty, interest and costs due and unpaid thereon, in the name of the county in which the sale takes place, such county acquiring all the rights, both legal and equitable, that any purchaser could acquire by reason of such purchase; Provided, that whenever any county shall acquire an interest in real property, or any rights with respect thereto, by reason of the same having been bid off in the name of the county as herein provided, such real property shall not be again advertised and sold for delinquent taxes so long as the county retains its interest in and rights to such real property; and provided further, that all taxes subsequently accruing against such real property, or that were unpaid at the time of such sale, and a lien thereon, but not included in such bid, shall be considered as a 'subsequent tax,' and before the county can make an assignment of such interest in and rights to such real property, or before an assignment of the certificate of such sale is made, all such taxes must be paid in full, including the amount for which such real property was so bid off, unless a compromise thereof is made as permitted by law, in which case the amount at which such compromise is made must be paid."

This statute establishes: (1) the 1935 sale excused any further sales; once sold a piece of property need not be sold again, but subsequent annual delinquencies must be added to the sale price and collected; (2) the installments of prior years must likewise be added; (3) the county treasurer must collect all such installments in full.

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* Although this statute in terms applies to general taxes, Sec. 6797, Rev. Code 1919, makes the procedure applicable to special assessments.

The statutory and judicial rule in South Dakota requiring that the owner who would avoid the effect of a voidable sale of his property for delinquent taxes or special assessments, has had universal application to cases of special assessment. See 44 C. J. 757, Sec. 3309.

As is said in the case of State ex rel v. Mayor, (Wis) 77 NW 167:

> "The tendency of legislation and of decision is more and more to require property owners who are contesting taxation, **either general or special**, to pay, as a primary condition of any relief, such part of the tax as is equitable and just, notwithstanding there may be serious irregularities in the original levy." (Emphasis ours).

The city is relieved from liability to the holders of special assessment certificates or bonds issued to provide funds for improvements for which special assessments are levied againt property benefited "at least until such proceedings had been carried to a conclusion, and had failed to produce the necessary funds for the payment of the warrants." Stephens v. Spokane (Wash) 44 P. 541.

The city may only be liable generally to pay "when the right to create the special fund upon which said warrants were drawn did not exist * * * the fact that the city officials had been guilty of negligence in not causing the money to be placed in the special fund at the earliest possible date would not be sufficient to make the city generally liable for payment of such warrants; that only when such negligence had resulted in the city being placed in such condition that it was beyond its power to cause the money to be placed in the special fund for the payment of the warrants, would such general liability be available to warrant holders." **Idem.**

In Hayne v. City of San Francisco (Cal.) 162 P. 625, the owner of property contended that the sale of his property

for a delinquent assessment was void because it was made more than ten days after January 14, 1913, the time fixed therefor in the notice of sale. The court held the complaint would not be entertained without payment of the amount justly due. It said:

> "As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases, the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. 253, 66 P. 303:
>
> 'This being the case, they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of unless on the condition of paying what is due from them. * * * Here, no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief.' "

The city is liable to bondholders on no other theory than that they will sustain a loss because proper steps have not been taken by its officers to collect.

The question of defective performance is abstract, unless the plaintiff shows wherein loss was suffered. A plaintiff has the burden of proof to show the elements of establishing the amount of his recovery. "When a breach of duty has cause no appreciable detriment to the party affected, he may yet recover nominal damages." S. D. Revised Code, 1919, Sec. 2003. Breach of a contract being proved, nominal damages are recoverable, Zipp v. Rubber Co., 12 SD 218, 80 NW 367, but to go beyond that and recover further compensation, the proof must demonstrate an actual loss caused by the wrongful act of defendant.

The applicability of such rule is plain. The rights of the bondholders here remained the same. No supervening liens are found to exist. The owners of the property must

lose their title under the sale proceedings of 1935, and the full security contemplated by statute inure to the benefit of the bondholders, or, if the sale proceedings are vulnerable and a property owner desired, the sale can be set aside but only upon payment of all the past due installments, with interest. Bondholders have suffered no detriment. The plaintiff has failed to show and the findings do not demonstrate wherein the bondholders will not receive as much from the property or from payments by property owners as if the certificates of the city auditor were sufficient to meet the most exacting tests of precision. The rights of the bondholders are not any greater than those of the property owner. Until the bondholder demonstrates that property or property owner have escaped in part if not in whole, the liability imposed by the assessments levied, he has not established a case where the city from its own funds should compensate him. It having been shown that property and property owner remain liable for the instalments despite irregularities in the certificates, exactly as if they were technically correct, the bondholders have failed to establish a cause for more than nominal damages.

Brief reference may be made to the theory on which the plaintiff relied below, and on which he will undoubtedly rest in this court. It is that all proceedings taken to divest an owner of title for failure to pay taxes are construed strictly against the taxing authority, and even as mandatory. The case of Huckstedt v. Jamison, 59 S. D. 464, 240 N. W. 506, was relied on. That case applied the rule of caveat emptor against the purchaser at tax sale, and involved the rights of a defendant who had acquired title to real property by tax deed. His title was set aside, but "upon condition that plaintiff first do equity by payment to defendant of all sums expended in payment of taxes, together with interest thereone at the statutory rates as in case of a redemption." The case fully sustains our position, that even if the sale were voidable, property owners could avoid its effect only upon payment of all sums due as in case of a redemption, and bondholders will sustain no loss. Whittaker v. Deadwood,

12 SD 608, 82 N. W. 202, was also relied on below. That case is distinguishable, because there the very proceedings involved in ordaining the improvement and the assessments were attacked, while here the special assessments are admitted and found to be regular. It is true that the sale was also held invalid, for failure to hold it at the time specified in the charter. The question of the property owner tendering or making payment of the amount justly due in order to avoid the sale was not discussed. If the proceedings leading up to the assessment were void, the property of course was not subject to assessment, and the property owner need not make such tender. Many other South Dakota cases establish that while tax deeds may be set aside for irregularities, the liability to pay what is justly due remains and payment of tax with interest is a condition precedent to relief vacating the sale or tax deed. Webster v. Cressler, 65 SD 571, 276 NW 263; McKinnon v. Fuller, 33 SD 582, 146 NW 910; Berry v. Howard, 33 SD 447, 146 NW 577; Easton v. Cranmer, 19 SD 224, 102 NW 944; Pettigrew v. Moody County, **supra**, page 27, 17 SD 275, 96 NW 94; Thompson v. Roberts, 16 SD 403, 92 NW 1079.

It is respectfully submitted that in its opinion the Circuit Court of Appeals for the Eighth Circuit misapprehended, if it did not improperly minimize, the effect of the statutes of South Dakota. The Court said that a serious doubt as to validity would seriously affect the possibility of collecting anything "from a sale clothed with a strong suspicion of illegality." But the lien of the special assessment is an everlasting lien as against the property assessed. Sec. 6403 S. D. Rev. Code 1919. The sale is merely a step in the foreclosure of a lien. As has been pointed out, if valid, then the property owners affected will lose their property when the time for redemption passes and the bondholders will realize the security behind the bonds. If they redeem, nothing has been lost to the bondholders. If they attempt to invalidate the sale, or the deed issuing when the period of redemption expires, they will be obliged to meet the equit-

able obligation of paying the full amount of assessments against their property.

In its opinion the Circuit Court of Appeals of the Eighth Circuit also said that "It may be, as the City contends, that because of the statutory direction that mere informalities will not affect the validity of tax title in South Dakota, the courts of that state would reach the conclusion that the error in the certification now under consideration was not a fatal defect, but that question is a highly debatable one which could only be definitely determined by judicial proceedings." Respectfully, it must be suggested that a judicial proceeding was pending for the very purpose of determining what, if any, prejudice or detriment could have resulted to the bondholders.

The court also reasons that the sale in 1935, clouded by obvious legal irregularities would not "attract cash purchasers at fair values. Absent such purchasers at those values plaintiff's opportunity to realize the amount of the delinquent assessments in cash was greatly minimized. The County's compulsory bid was of no benefit to plaintiff since it only resulted in the transfer of title without the payment of any cash consideration. And the fact that the County's compulsory bid was the only one received implies a scarcity of interested buyers and tends to further strengthen plaintiff's contention that the patent irregularity in the certification materially and injuriously affected the sale. The protection to the purchaser at the tax sale afforded by the requirement that the amount of delinquent assessments must be paid before his title be disturbed is no substitute for the right of the plaintiff to a sale as free from legal defects as the City could reasonably make it." But the bid of the County was of value, since it commenced the period within which redemption must be made or property lost under deed to the County. Ch. 64 & 65, S. D. Session Laws of 1933. In South Dakota at least, the purchase of real property by the county at tax sales is not such a phenomenon as the court apparently considered. There are statutes permitting the

county treasurer to bid off property offered at tax sale (Sec. 6794 S. D. Rev. Code of 1919) and providing the method of disposition of property acquired by the county by tax deed (Sec. 6803 R. C. 1919, Ch. 64, S. D. Session Laws of 1933, Ch. 83, S. D. Session Laws of 1937). Judicial notice may be taken of local financial and economic conditions. Culhane v. Equitable Life Assurance Society, 65 SD 337, 274 NW 315, Home Bldg. and Loan Assn. v. Blaisdell, 290 U. S. 398, at p. 444. Moratorium acts of the state legislature, in elaborate preambles, have found the existence of a state of agricultural and financial depression, resulting among other things, in a situation whereby owners of property are "unable to meet obligations for * * *taxes * * *." Ch. 145, S. D. Session Laws of 1939; Ch. 207, S. D. Session Laws of 1937; Ch. 178, S. D. Session Laws of 1935. In the face of such facts, it is clear that a lack of cash bidders at the sale resulted, not from a defect in the procedure, but from the economic conditions in the state. Indeed, a local court would have known judicially that even in prosperous times nearly all property sold for delinquent taxes is purchased by the county. Further evidence of local conditions is found in other legislation pertaining to taxes; so accentuated has been the condition that the Legislature of South Dakota in 1939 passed legislation permitting the county commissioners to compromise personal taxes more than two years past due, Chapter 284, Session Laws of 1939; permitting payment of delinquent real estate taxes in ten annual instalments on contract with the county without interest on the contract amount, Chapter 279, Session Laws of 1939, and also permitting payment of principal of taxes delinquent upon real estate at any time prior to December 31, 1939, with an abatement of all interest accrued and penalty charged, Chapter 280, Session Laws of 1939. The first statute providing for the contracting of payment of delinquent taxes by which the person liable for them was given ten years in which to pay without interest is found in Chapter 194 of the Session Laws of 1935. Similar legislation was found in Chapter 241, Session Laws of 1937.

Such legislation, an innovation, and having the purpose

to make it attractive for tax payers to pay delinquent taxes indicates the prevalence of the condition to which reference has been made. It is respectfully submitted that it makes it apparent that the court has inadvertently attributed the fact that there were no purchasers for the property offered for sale in 1935 other than the county to the illegality in certification while properly it should be referred to the financial conditions in the state.

In Webster v. Cressler, **supra**, the contention was that an assessment of taxes was void because the assessor failed to take the oath prescribed by law and failed in other respects strictly to comply with the statutes, and the court should have reassessed the property. A judgment requiring appellant landowner to pay the amount of taxes and interest and penalty assessed, to the holder of a void tax deed was affirmed. The court said:

> "Appellant has failed to show that the assessment was unjust or inequitable in relation to other assessments, and therefore is not entitled to have the property assessed by the court because of the failure in some other respects to make this assessment strictly comply with the statutes.
>
> The trial court is directed to modify its judgment by deducting, from the amount of the lien allowed the plaintiff, the costs of procuring the tax deed, and as thus modified, the judgment is affirmed."

So it makes no difference in result in this action for damages which conclusion is adopted. If the irregularities complained of have not prejudiced the property owners, and they cannot avoid the lien (a perpetual lien, Sec. 6403 S. D. Revised Code, 1919), or defeat a sale of their property for nonpayment of the assessment, the bondholders have suffered no loss. At least, full realization of the security, the property against which assessments were levied, will be theirs. On the other hand, even if the property owner can avoid the sale, and thus save his property from deed issuing,

it can be only on the equitable condition, given full scope in the South Dakota statutes and decisions, that he pay the assessment in full. The result is that no more than nominal damages were proved.

III

ON NO THEORY HAVE MORE THAN NOMINAL DAMAGES BEEN ESTABLISHED ACCORDING TO THE STATE RULE AND THE RULE OF THE TENTH CIRCUIT.

In considering and deciding a similar case, the Circuit Court of Appeals of the Tenth Circuit held exactly in line with the contention of the petitioner here, that proof of a default on the part of the city would not establish a liability on the city to pay bondholders, if there were no proof of the actual damages sustained. The Court stated the true rule as follows:

> "Where the owner of an obligation enters into a contract with another to act as agent of the owner in the collection of such obligation and to take certain steps to enforce the obligation and the agent fails and neglects so to do, would the agent be liable to the owner of the obligation for the principal thereof with interest when the owner may still enforce payment of the obligation by the debtor? We think not. It seems to us the same rule should apply here."

This is found in the case of Gray v. City of Santa Fe (CCA10) 89 F (2) 406. This Honorable Court has indicated approval of the same rule. In Peake v. City of New Orleans, 139 U. S. 342, it is said:

> "Where an official board (of a city) assumes the obligation of collecting assessments, the mere fact of noncollection does not prove dereliction of duty where they are charged upon property not worth the assessment, therefore were not collectible."

Approval also appears in Moore v. City of Nampa 276

U. S. 536, where it is said:

> "The demurrer was rightly sustained unless the complainant shows that the breach of respondent of some duty it owed petitioner caused the damages sustained."

The Supreme Court of South Dakota has clearly indicated that special assessments against property benefited by the local improvement are not charges against the general funds of the city, and are not payable out of money raised by taxation. Suttor v. Town of Wetonka, 62 S. D. 339, 253 N. W. 64; Gross v. City of Bowdle, 44 S. D. 132, 182 N. W. 629. The question, is, therefore, what damages have been shown to have been sustained by loss or depreciation of the security, that is, the property against which the assessments were levied. None is pleaded or proved.

It is the holding of this Honorable Court in Moore v. City of Nampa, 276 U. S. 536, that the cause of action in the bondholder in a case such as this is not on contract, but is in tort, based on negligence. In the preceding portions of this brief, following the reasoning of the District and Circuit Court of Appeals, it has been assumed that the action was contractual, based upon the promise of the city contained in the bonds to levy assessments and cause the same to be collected and paid into a fund to be used solely for the payment thereof (3). But, whether the action sounds in tort or contract, the result must be the same: in the absence of proof of damages, none but nominal damages are recoverable. This is the only result that can be obtained by application of local statutes and decisions which are controlling. Erie R. Co. v. Tompkins, 304 U. S. 64.

First, the South Dakota statutes may be examined. "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." Sec. 1959, S. D. Revised Code, 1919. "Detri-

ment is a loss or harm suffered in person or property." Sec. 1960, S. D. Revised Code, 1919.

As to contracts, the rule found in Sec. 1966 S. D. Rev. Code of 1919 is as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. **No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.**" (Emphasis ours.)*

As to torts, the rule is stated in section 1984, S. D. Rev. Code, 1919, as follows:

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Sec. 2002, S. D. Rev. Code 1919 provides that "Damages must in all cases be reasonable," and Sec. 2003 S. D. Rev. Code of 1919 provides as follows:

> "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

From these clear statements, embodied in statute, the conclusion must be that absent proof of the detriment caused by the act of the city auditor, no damages, other than nominal could be recovered.

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*The distinction between the state rule as declared in this statute (Sec. 1966, S. D. Rev. Code 1919), that damages must be certain, both in their nature and origin, and the Federal rule, that if the cause of the damages were clearly ascertainable, the extent of damages could be proved by approximation (Midland Valley R. Co. v. Excelsior Coal Co. (CCA8) 86 F (2) 177, Story Parchment Company v. Paterson Paper Co., 282 U. S. 555) is striking.

The course of judicial decision in South Dakota is to the same effect.

In actions ex delicto, the Supreme Court of South Dakota has said that damages will not be permitted where there are no facts proved which would establish them (Gamble v. Keyes, 43 S. D. 245, 178 N. W. 870). In an action by an agent having an exclusive right to sell machinery in a county against his principal for having breached a contract permitting another to makes sales in the county, the agent can recover no more than nominal damages upon merely showing the breach by the principal. Roberts v. Minneapolis Threshing Machine Co. 8 S. D. 579, 67 N. W. 607. In this case, the Supreme Court of South Dakota said that "without anything before the jury as a basis for the computation of compensatory damages, and in the entire absence of evidence tending to show that in any event appellant (plaintiff) would have made either of the sales complained of, or that he performed any act with reference thereto, mere proof of the violation of the contract would entitle appellant to no more than nominal damages, * * *" and "that the actual detriment occasioned must be shown by competent evidence, and with reasonable certainty, in order to entitle appellant to anything more than nominal damages."

Thus, in tort and contract actions, the Supreme Court of South Dakota has said that damages must be proved by substantial evidence. This seems to be elementary not only in that state, but in all jurisdictions, but if so, all the more glaring is the error into which the Circuit Court of Appeals has fallen.

Applying the same principle, in Wylly v. Grigsby, 10 S. D. 13, 70 N. W. 1049, 11 S. D. 491, 78 N. W. 957, the Supreme Court of South Dakota held that the unauthorized and fraudulent act of an agent in delivering a release of a mortgage to the owner of land, which was recorded, gave rise to an action for conversion by the owner of the mortgage for nominal damages only, when it appeared that the

title to the land remained in the hands of one not a bona fide holder for value, and the right to foreclose the mortgage had not been appreciably affected.

Similar must be the result here. What rights of the bondholders having as security the assessments against the property have been shown to have been diminished or impaired in the least?

If it be conceded that the defective certification by the city auditor may have caused a delay in collection, then the rule that interest is the damage resulting from failure to pay money when due, should apply.

In Louden v. Taxing District 14 Otto 771, it is said:

> "All damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages."

The difficulty is that plaintiff has not proved that any delay has been caused, or that the bondholders are not in exactly the same position they would have found themselves in if certification had precisely and technically followed the statute.

As to principal of the bonds, the same logical difficulty follows. The security back of them does not appear to be any less valuable, or any less amenable to eventual liquidation, either by title to the property vesting in the county, or by redemption by the property owners, than if certification had followed the exact method prescribed by statute.

The trial court has found the city liable for the full amount of principal and interest of the seventeen bonds which plaintiff holds as trustee, and yet the proof shows that some property owners have never permitted instalments to become delinquent. (Exhibit J (48).) Further, proper certifications were made in 1937 and 1938, and a sale held in 1935 by the county treasurer, and the certifications

from 1932 to 1936 inclusive were but irregular. Clearly, the city as a guarantor, in form, against loss to the bondholders by default of its officers, is not liable for the whole of the principal and interest of these seventeen bonds, but only for such loss as in origin and amount is clearly ascertainable from the acts of the city auditor. (Section 1966, Rev. Code 1919).

A breach of duty by the city auditor might be so gross as to make the city liable for the whole of the principal of the bonds plus interest. No such breach appears here. The question must recur, to what extent has damage been suffered by the bondholders. If, for example, a city auditor failed to certify as delinquent a piece of property on which an instalment of $100.00 was delinquent, would the city, in a total bond issue of $100,000 be liable for $100,000 or $100.00? Clearly the latter. If certification were imperfect for one year, but property owners paid in full, would the city still be liable? If the property owners did not pay, but deeds issued upon appropriate procedure, and the statutory security for the bondholders eventually paid them their full principal and interest, have they suffered any damages.

The inquiry for the court in this case was what, if any damages, were to be paid to compensate the bondholders.

Such inquiry has not been made.

The Circuit Court of Appeals of the Eighth Circuit refused to consider the question of damages because it felt itself bound by its own precedents, the case of City of Canton v. Tinan 104 F(2) 961, which automatically followed as a precedent the case of City of McLaughlin v. Turgeon, 75 F(2) 402, the opinion in which case was filed January 28, 1935, subsequently to which, on April 25, 1938, Your Honors decided Erie R. Co. v. Tompkins, 304 U. S. 64, making more commanding than had been true before, the law of the state of the controversy. It is suggested, with the respect properly to be given the judges of that learned court, and to its eminence and reputation, that in deciding

the case of City of McLaughlin v. Turgeon, **supra**, the Circuit Court of Appeals for the Eighth Circuit, did not give such effect to the law of the state as would have been given had that case been decided after, rather than before the decision in Erie R. Co. v. Tompkins.* The subsequent case of City of Canton v. Tinan, supra, and the instant case, it seems clear, were decided on the basis that City of McLaughlin v. Turgeon was a controlling precedent, without considering the effect that Erie R. Co. v. Tompkins had upon all prior Federal decisions, which had been written under the influence of Swift v. Tyson, 16 Pet. 1, the rule of which was repudiated by Erie R. Co. v. Tompkins.

On the question of damages, in City of McLaughlin v. Turgeon, **supra**, the Circuit Court of Appeals for the Eighth Circuit said that the plaintiff

"in the circumstances here disclosed, was entitled to sue for damages for breach of contract, the measure of his damages being the contract price, or, in this case, the amount due on the bonds, as held by the lower court. Freese v. City of Pierre, 37 SD 433, 158 N. W. 1013; Coolsaet v. City of Veblen, 55 SD 485, 226 N. W. 726, 67 A L R 1499; Barber Asphalt Paving Co. v. City of Denver (CCA8) 72 F 336; Bates County, Mo. v. Wills (CCA8) 239 F. 785; Barber Asphalt Paving Co. v. City of Des Moines 191 Iowa 762, 183 N. W. 456; Grand Lodge v. City of Bottineau, 58 N. D. 740, 227 NW 363." (at p. 410).

It is apparent from the quotation itself that the Court was not attempting to rest its decision on South Dakota decisions alone, and was not considering the state statutes. A brief study of the decisions cited as authority convinces that they are not authority for the broad rule laid down. The case of Barber Asphalt Paving Company v. City of Denver 72 F. 336, was a case from Colorado, decided by the

*This is all the more apparent because prior to the decision in Erie R. Co. v. Tompkins, the Federal courts adopted the rule that in tort or contract, they would follow their own rule, rather than the state decisions. Wolden v. Larson (CCA9) 164 F 548 (torts); Clark v. Belt (CCA8) 223 F. 573 (contracts).

Circuit Court of Appeals of the Eighth Circuit. It is important to note that this was a case by the contractor against the city to recover the contract price of paving. An action by a contractor against a city on its contract, he being unsecured and having the promise of the city to pay, is radically different from an action by bondholders on bonds issued by the city, which do not contain its promise to pay, but to use good faith to follow the statutory procedure to collect, and which are secured by levies against property. Liability in that case is based on the proposition of law that one who induces a contractor to perform labor or furnish materials by his promise that a third person will pay the contractor the agreed price of what he furnishes, cannot enjoy the fruits of the contract, and leave the contractor remediless. He becomes primarily liable to pay the contact price himself. (See p. 338 of 72 Federal). The facts in that case were that the city promised in the contract that a part of the contract price would be paid by a street railway company, at the time and in the manner directed. The city did not cause the street railway company to pay and refused to pay itself. The importance of the contract entered into by the city, undertaking a primary obligation to pay is manifest throughout the opinion, and is evident from such statements as "This contract was between the city and the paving company" (page 340) and "By this contract the city became primarily liable to pay that part of the contract price of these improvements which it agreed that the railroad companies should pay, when it failed, for an unreasonable length of time after the completion of the contract to cause the companies to make the payment" (page 340).

The case of Bates County v. Wills (CCA8) 239 F 785, is exactly similar. This was an action by the contractor against the county on the original contract. The county refused to pay or to proceed to make funds available. This case arose in Missouri.

*Cf. Lincoln v. Ricketts (1936) 296 U. S. 374, in which a decision of the Circuit Court of Appeals of the Eighth Circuit was reversed and the case returned for a determination of the issue of local law.

Barber Asphalt Paving Co. v. City of Des Moines, 191 Ia. 762, 183 NW 456, is another case of an action by the contractor, who claimed damages against the city because it had failed to make a certain piece of property subject to special assessment, and to provide for interest on the assessment certificate. In that case, clearly, the damages were the amount of which the contractor had been deprived, the amount of the special assessment certificate which the city had failed to make a lien against a particular piece of property, and also the interest on the total amount of special certificates issued and which the city had failed to make provision for in its procedure.

Another case cited is the North Dakota case of Grand Lodge v. City of Bottineau, 58 N. D. 740, 227 N. W. 363. In that case, the statute required the city to bid in the property benefited if there were no bidders. It failed to do so and the county in the end took tax deed to the property. The security for the special assessment warrants was lost to warrant holders.

Turning now to the South Dakota authorities cited by the court, the first is Freese v. City of Pierre, 37 SD 433, 158 NW 1013. This was an action by the assignee of the contractor against the city, which the Supreme Court found had disabled itself from levying an assessment against property included in the special assessment district. The court found that the whole proceedings were void, and directed judgment to be entered against the city for the balance due on the contract. The Court held that since the city had proceeded from the outset in an improper and unlawful manner,* and had disabled itself not only from assessing against the property benefited the amount of the contract price, but had also disabled itself from reassessing for the same purpose, it was liable to the contractor's assignee for the balance due on the contract. It is not

*The court said (p. 438 of 37 S. D. p. 1014 of 158 N. W.) that the proceedings up to the filing of the assessment roll "from the beginning up to this point exhibited a most flagrant disregard of law on the part of the city council."

seen how under the facts a different result could be reached. The city had made it utterly impossible for the contractor to be paid through the contemplated agency of special assessments. The court held (p. 442 of 37 S. D., p. 1016 of 158 N. W.) that the city was liable for the full amount due the contractor on another theory. The assignee of the contract was also assignee from the city of treasurer's sale certificates aggregating a sum in excess of the amount due on the contract. The court quoted Section 1319 of the Political Code of 1903, as follows:

> "Whenever a special assessment for a local improvement shall be set aside or declared null and void by a court of competent jurisdiction, the city shall save the purchaser at the sale for said special assessment harmless, by paying him the amount of the principal which he paid upon such sale, together with interest at 12 per centum from the date of sale."

The court held that as assignee of these certificates, the plaintiff was in the same position with reference to them as a purchaser at the treasurer's sale would have occupied, and was entitled to recover the amount of the certificates with 12 per cent interest from the city.

The statute was influential in the court's decision in that case. It was part of the 1903 code. It was left out of the 1919 Code, the next revision of South Dakota statutory law. It required as a condition of liability on the part of the city that the special assessment should have been set aside or declared null and void. It indicated a statutory policy of liability since repealed, which reveals, if anything, a legislative policy to exempt cities from liability, to remit the purchaser to his remedy against the property provided by Section 6412 Rev. Code 1919. The case of Freese v. City of Pierre is not authority to sustain a broad, inclusive rule that the city is liable to bondholders for all defects or irregularities that might occur in taking the statutory steps to collect delinquent assessments, when the improvement was regularly begun and completed and the assessment

against the benefited property was properly levied.

The final authority cited is Coolsaet v. City of Veblen, 55 SD 485, 226 N. W. 726. The case is complicated at least by the fact that the city had entered into a stipulation for judgment for the amount due on its contract. The judgment was entered on the stipulation and the city then attempted to appeal. **Again, this was an action by the contractor,** whose right to realization of payment by special assessment was utterly defeated, through procedural defects. The contract obligated the city to pay in cash or valid special assessment certificates.

The South Dakota cases are not authority for the proposition that the respondent here must sustain: that in an action by bondholders, whose bonds are payable only from the proceeds of special assessments, the bondholders are entitled to recover from the city the full amount of their bonds, upon mere proof that an officer of the city, committed a procedural error, which it is not shown has caused the bondholders a detriment to any extent. It must be submitted that to sustain this proposition requires a disregard of the South Dakota statutes and Supreme Court decisions. Authorities sustaining the right of the contractor to enforce the primary obligation of the city on the contract of improvement, preceding the entry of the bondholders upon the scene, who do not take the obligation of the city to pay but only to act as collecting agent are clearly not apposite.

CONCLUSION

Petitioner submits that the decision of the Circuit Court of Appeals is contrary to decisions of this Honorable Court, and to the decisions of the Supreme Court of South Dakota and to the statutes of that state, and is contrary to the decision in a like case of the Circuit Court of Appeals of the Tenth Circuit, and that for the reasons set forth in the petition the case calls for the exercise of this Court's power of review.

Respectfully submitted,

Max Royhl,

George E. Longstaff,

Attorneys for Petitioner.

APPENDIX I

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 11,687.— May Term, A. D. 1940.

CITY OF HURON, a municipal corporation, Appellant,

vs.

T. G. EVENSEN, Trustee, Appellee.

Appeal from the District Court of the United States for the District of South Dakota

July 9, 1940

Mr. Irwin A. Churchill, submitted brief for Appellant.

Mr. Perry F. Loucks and Alan L. Austin, submitted brief for the Appellee.

Before SANBORN and WOODROUGH, Circuit Judges, and COLLET, District Judge.

COLLET, District Judge, delivered the opinion of the Court.

Action against the City of Huron, South Dakota, on special assessment bonds issued by the City. The judgment was in favor of the bondholder and against the City. From that judgment the City appeals. The parties will be referred to as the "City" and the plaintiff.

On November 1, 1931, the City issued in the aggregate $27,000.00 of special assessment bonds for the purpose of obtaining funds with which to pave Dakota Avenue North. The bonds were in denomination of $1,000.00 and each bore attached interest coupons providing for the payment of semi-annual interest. The bonds contained a recital that they were issued in lieu of special assessment certificates and in anticipation of the collection of special assessments to pay the cost of paving Dakota Avenue North. Each

bond contained the following covenant or pledge:

> "The City of Huron hereby pledges its full faith and credit to levy special assessments upon the property benefited by said improvement in an amount sufficient to pay principal and interest thereon as the same become due and to cause said assessments to be collected and paid into a fund to be used solely for the payment thereof."

The bonds were all sold. Bonds numbered One to Nine inclusive have been paid. Bonds numbered Ten to Twenty-seven inclusive, except Number Fourteen, the owner of which could not be located, are held by plaintiff as Trustee. Plaintiff is a resident of Minnesota.

A special assessment was levied against the property abutting Dakota Avenue North sufficient to provide for the discharge of the principal and interest of the bonds. The assessment was divided into ten equal annual installments. The first was due October 6, 1931, and delinquent December 7, 1931. Other installments were due each year thereafter.

In 1931 and in each of the succeeding years 1932 to 1938 inclusive, the annual installments for a number of the special assessments became delinquent.

The statutory law of South Dakota provides that the City Auditor shall, between the 15th of September and the 1st of October, certify all delinquent special assessments to the County Auditor. (1) The County Auditor is directed to immediately certify the delinquent assessments to the County Treasurer who must collect them (2) by sale of the properties, if necessary, at the next tax sale.

In the years 1932 to 1936, inclusive, the City Auditor did not certify the delinquent assessments to the County Auditor but transmitted them to the County Treasurer. The County Treasurer made no effort to sell any property upon

which the special assessments for the years 1931 to 1937, inclusive, had become delinquent except some sales made in 1935. These latter sales were to the County.(3)

Plaintiff made demand on the City to pay the bonds,

(1) "CERTIFYING DELINQUENT ASSESSMENTS. It shall be the duty of the city auditor or town clerk, between the fifteenth day of September and the first day of October in each year, to certify to the county auditor of the county in which such municipality is located, or if located in more than one county, to the county auditor of the county in which the property assessed is located, all special assessments remaining unpaid, which became delinquent on or before the fifteenth day of September of that year. In certifying such special assessments, the city auditor or town clerk shall specify the consecutive number of the assessment, as shown by the tax book in his office, the original amount of the assessment, or installment thereof, so certified, the amount of the interest and penalty thereon to the fifteenth day of September of that year, the name of the person in whom the title to the property rests, as shown by said tax book, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was made, and it shall be the duty of the county auditor and the county treasurer to proceed, with reference to such assessment, as provided in Section 6797."

(Section 6402 of the Revised Code of 1919, as amended by Chapter 269 of the Session Laws of 1919, and Chapter 187 of the Session Laws of 1929).

(2) "SPECIAL ASSESSMENTS IN CITIES AND TOWNS. Whenever delinquent special assessments levied in any city or incorporated town shall be certified to the county auditor as provided in article 6, chapter 9, part 8, of this title, it shall be the duty of such auditor to immediately certify the same to the county treasurer, and such delinquent special assessment shall be collected by the county treasurer, by sale of the lots or parcels of land so assessed at the next succeeding sale of real property for delinquent taxes, in the same manner and at the same time and place. All real property sold for such delinquent special assessments and not redeemed shall be entered by the county treasurer upon the duplicate tax lists of the county for the succeeding years, and noted upon all duplicate tax receipts for such real property; and it shall be the duty of the county treasurer to add to the amount of each special assessment so certified interest at the rate of one per cent per month, and ten cents on each lot or parcel of ground for costs of advertising and no other costs or penalties shall be added except as provided by law for certificate of sale, deed, and acknowledgment. Sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the county treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales."

(3) The County was obliged to bid the whole amount of principal, interest and costs due. Sec. 6787, amended by Chapter 197, Session Laws of 1933; Secs. 6792 and 6794 R. C. 1919.

asserting the latter's obligation to do so because of its failure to perform its pledge to cause the assessments to be collected. The City's refusal resulted in the filing of this action in 1939.

The trial court found that the purchasers of the bonds relied upon the representation and agreements of the City that it would cause the special assessments to be collected and paid into a fund to be used solely for the payment of the bonds. That court concluded that the City had breached that covenant in a substantial manner. The judgment for plaintiff for the amount due on the bonds followed.

The City contends that the failure of the City Auditor to certify the delinquent special assessments to the County Auditor as the Statute required, was a mere irregularity not affecting in any way the obligation of the taxpayer to pay, the duty or obligation of the County Treasurer to sell, or the lien of the special assessment, and was in no way prejudicial to the bondholder.

If the City's dereliction was a mere inconsequential irregularity its argument would have much force. But if its failure to certify as directed by Statute threw any serious doubt upon the validity of the certificates and subsequent proceedings for the collection of the taxes, the covenant of the bonds was violated. While the trial court found that the tax sales in 1935 were void as a result of the erroneous certification, that result would not be necessary to a violation of the City's covenant. Actual invalidity of the certification would completely destroy plaintiff's right to collect, while serious doubt as to validity, which might later be determined by the Courts in favor of validity, would still seriously affect the possibility of realizing anything from a sale clothed with a strong suspicion of illegality. The City agreed to cause the assessments to be collected. It did not guarantee the collection, but it did in effect agree not to do anything that would seriously interfere with the collection of the assessments.

Substantially the same question involved in this case

has been determined by this Court in City of McLaughlin v. Turgeon, 75 F. (2d) 402 and City of Canton vs. Tinan, 104 F. (2d) 961. In the former case the City Auditor made only one certification, certifying simultaneously delinquent assessments for several years and all remaining assessments not then delinquent. The certification was held to be so irregular as to amount to no certification and the City was held liable for a breach of its covenant, similar to the one here involved. In the City of Canton case the delinquent assessments for the first four years were certified simultaneously. Later certifications were properly made. Applying the principle enunciated in the City of McLaughlin case the certification was again held to be so irregular as to constitute a substantial breach of the same covenant.

While obviously the facts in neither of the two cases referred to are identical with the facts here, there can be no real distinction for present purposes between a breach of covenant arising out of a certification such as those in City of McLaughlin v. Turgeon and City of Canton v. Tinan, supra, and the certification in the present case which was made in defiance of the plain provision of the Statute to the wrong official. It may be, as the City contends, that because of the statutory direction that mere informalities will not affect the validity of tax titles in South Dakota, the courts of that state would reach the conclusion that the error in the certification now under consideration was not a fatal defect, but that question is a highly debatable one which could only be definitely determined by judicial proceedings. The City did not do all it reasonably could do to cause the assessments to be collected when it brought about the present situation. Its dereliction substantially affected plaintiff's rights and hence was a substantial violation of its agreement.

The contention that plaintiff's opportunity to collect the assessments due on the property which was sold to the County in 1935 has not been injuriously affected because the former owners of that property would be required by the

Law of South Dakota to pay all delinquent assessments before the tax deeds could be invalidated, (1) is in effect an argument in support of the theory that the error in certification was not a substantial breach of the City's covenant. The answer to that argument is that plaintiff was entitled to have the sale as free from irregularities as reasonable care on the part of the City could make it. A sale clouded by obvious legal irregularities does not attract cash purchasers at fair values. Absent such purchasers at those values plaintiff's opportunity to realize the amount of the delinquent assessments in cash was greatly minimized. The County's compulsory bid was of no benefit to plaintiff since it only resulted in the transfer of title without the payment of any cash consideration. And the fact that the County's compulsory bid was the only one received implies a scarcity of interested buyers and tends to further strengthen plaintiff's contention that the patent irregularity in the certification materially and injuriously affected the sale. The protection to the purchaser at the tax sale afforded by the requirement that the amount of delinquent assessments must be paid before his title be disturbed is no substitute for the right of the plaintiff to a sale as free from legal defects as the City could reasonably make it.

The further contention that the judgment was excessive has been decided adversely to the City in both City of McLaughlin v. Turgeon and City of Canton v. Tinan, supra.

The judgment is affirmed.

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(1) South Dakota Revised Code 1919, Sec. 6412:

"No injunction restraining the making of any local improvement under the provisions of this chapter shall be issued after the letting of the contract therefor; and whenever any action or proceeding shall be commenced and maintained in any court to restrain the collection of any assessment levied for any municipal local improvement, to recover any such assesment previously paid, to recover the possession or title of any real property sold for such an assessment, to invalidate or cancel any deed or grant thereof for such an assessment, or to restrain or delay the payment of any such assessment, the true and just amount of such assessment due upon such property must be ascertained, and judgment rendered therefor, making the same a lien upon the property and authorizing execution or process to issue for the collection thereof by a sale of the property."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 427

CITY OF HURON, a Municipal Corporation,

Petitioner,

vs.

T. G. EVENSON, Trustee,

Respondent.

REPLY BRIEF OF PETITIONER

MAX ROYHL
GEORGE E. LONGSTAFF,
Counsel for Petitioners.

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Because of misconceptions and misstatements found in the brief of the respondent, the petitioner feels it a duty to submit this reply brief.

The case of Gray v. City of Santa Fe, 89 F (2) 406, decided by the Circuit Court of the Tenth Circuit is not based upon any local rule and is not based upon any local statute. Indeed, Footnote 5 advises the reader that there is no decision of the Supreme Court of New Mexico, in which state the case arose. Nor do the cases in the Eighth Circuit upon which the respondent relies purport to be founded upon any local rule. City of McLaughlin v. Turgeon, 75 F (2) 402 is the controlling decision and this cites as a partial basis for its decision two South Dakota cases, Coolsaet v. City of Veblen 55 SD 485, 226 NW 726, and Freese v. City of Pierre, 37 SD 433, 158 NW 1013, which, as is pointed out in the brief of the petitioner are both cases involving an action by the contractor on his original contract with the city. The distinction is valid and is not assailed in any substantial way by the respondent. The contractor when he starts work has nothing but the promise of the city to pay

when the work is completed. When the improvement is done then the contract is at an end and the city levies or is supposed to levy the special assessments for the security and payment of the special assessment certificates or the bonds if they are issued in lieu of special assessment certificates. See Sections 6348, 6349, 6350, 6351, S. D. Revised Code 1919, providing for the making of the contract and Sections 6404 to 6409, inclusive, providing for the method of paying the contractor.* The contractor contracts with the city to perform the work and the city agrees to make available to him the statutory methods of payment. If it does not do so, and the work has been completed, naturally the damages recoverable would be the amount of the contract price. Such are the South Dakota cases cited by the Court in the McLaughlin case but distinguishable indeed is the case where the work has been done and the contractor has been paid the amount of his contract price and the purchasers of the bonds have taken them knowing that the security back of them is the amount of the contract price assessed against the real property benefited. Until it is shown at least that the security back of the bonds has been impaired by some default of the city, no cause of action has been established, other than nominal damages.

It is clear that in the Eighth Circuit Court case of City of McLaughlin v. Turgeon, supra, no effort was made to ascertain the local rule because there was no applicable decision of the Supreme Court of South Dakota and the statutes of South Dakota pertaining to damages which the petitioner has cited in its original brief, Sections 1959, 1960, 1965, 1966, 1984, 2003, S D. Revised Code 1919, were not examined and were not referred to in the least. These were the governing rules, absolutely ignored by the court. If the Court had applied a local rule, it would have been unnecessary to refer to cases from other jurisdictions. The important question from all of these cases is: What is the proper rule of dam-

* The procedure and the applicable statutes in the making of the contract and the raising of funds to pay the contractor are quite thoroughly described in Suttor v. Town of Wetonka 62 SD 339, 253 NW 64.

ages? The statutes of South Dakota and the decisions of the Supreme Court of that state establish that compensatory damages must be established by proof in the record, otherwise only nominal damages have been proved.

The respondent cites Section 1967 SD Revised Code 1919, which has never been referred to in any of the Eighth Circuit Court cases dealing with the question. That statute provides that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon. But the obligation of the City is not an obligation to pay money. Suttor v. Town of Wetonka, 62 SD 339, 253 NW 64. In this case, the relationship of the City to the bonds is stated as follows:

> "the municipal corporation is the instrumentality to make the improvement and collect the assessment without primary liability on its part." (Page 67 of 253 N. W.)

The statutes of the state in this case, it is said, do "not indicate an intention to shift the burden or any portion thereof from the property benefited to the municipal corporation." (Page 67 of 253 N. W.)

Repeatedly, the respondent attempts to create the impression that the city in this case owns special assessment certificates against the property benefited. This is not true. There are two methods in South Dakota of paying the contractor. See Suttor v. Town of Wetonka, **supra.** Payment could be by method of special assessment certificates in which the assessment was levied against each parcel of property and the certificate issued to the contractor. Section 6405 Revised Code 1919 as amended by Chapter 269 Session Laws 1919. The other method is of issuing and selling bonds to pay the costs of the improvement. Section 6409 SD Revised Code 1919 as amended by Chapter 319, Session Laws of 1921. The latter was the method followed in this case and when that is followed the special assessments are made a matter of record against the property and the city becomes

the owner of no certificate or other obligation or lien against the property. That is true in either case. These statements are merely attempts to mislead.

On Page 22, the respondent states the rule is that where bondholders with security for payment in the form of special assessments against the property benefited sue the city for damages, the bondholder need not prove the value of each parcel of property and the amount of general taxes against it. This is not the rule in South Dakota. There is no authority for such statement.

The respondent also attempts on Page 22 and 23 to argue that the City should prove facts in mitigation of the damages. Such duty of course cannot arise until the plaintiff has made out a case for other than nominal damages. The respondent is confused. The duty to mitigate damages arises only where there is a question of plaintiff having used reasonable care and diligence not to augment or increase the damages. See 17 CJ 1074.

On Page 23, the respondent attempts to hold the City liable because the Legislature of South Dakota extended the time of redemption from tax sales from two to four years.

Further, on Page 24, the statement is made that counsel for the petitioner knew that for a period of years when general tax sale certificates in South Dakota drew 12% interest a fellow resident repeatedly bid down all of the certificates offered in whole counties to as low as 4% interest. Counsel has never heard of anyone in South Dakota doing that.

Counsel cite many cases and rely upon them in which tax deeds were voided. It may be that in some of these cases language is found which would indicate that the Court concluded that a tax deed was void for irregularities in the proceedings leading to its issuance. Whatever the language may be, at least in South Dakota, if the deed may be voided, the purchaser cannot be denied his right to re-

imbursement for the entire amount of taxes paid and for all expenses he is put to. A long quotation is made from the case of Huckstedt v. Jamison, 59 SD 464, 240 NW 506, at Page 30 of the brief of respondent in which the tax deed was held void but the respondent leaves out the portion of this case quoted from the Petitioner's brief on Page 32 holding that the plaintiff attempting to void the tax deed must pay all sums expended in payment of taxes together with interest thereon at the statutory rates as in case of a redemption. On no theory imaginable can the decision of the Eighth Circuit Court of Appeals be sustained when put side by side with the statutes and decisions of the Supreme Court of South Dakota pertaining to damages.

It is submitted respectfully that the Petition should be granted.

Respectfully submitted,

MAX ROYHL
GEORGE E. LONGSTAFF,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 427

CITY OF HURON, A MUNICIPAL CORPORATION,
Petitioner,

vs.

T. G. EVENSEN, TRUSTEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF T. G. EVENSEN, TRUSTEE, RESPONDENT, IN OPPOSITION

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Supreme Court of the United States

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SUMMARY AND SHORT STATEMENT OF THE CASE

This action is brought by T. G. Evensen, as Trustee, as the owner of and the party in possession of seventeen special assessment paving bonds issued by the City of Huron, South Dakota, and upon the theory that the City of Huron has become primarily and directly liable for the payment of both principal and interest on such bonds by reason of its failures to comply with the provisions of the bonds pledging the good

faith of the City in the collection of the assessment certificates which had been issued by the City of Huron following the paving of part of Dakota Avenue North, the main north and south street of Huron.

The trust agreement attached to the complaint specifically provides for the pro rata payment to the holders of the seventeen bonds of all moneys collected, thereby eliminating from consideration the question of whether or not upon the insolvency of the assessment district pro rata payment of principal and interest must be provided for and the complaint alleges, and the stipulation of facts shows, the *bona fide* effort of the Trustee to reach an adjustment with the City of Huron, which had failed, and the Trustee is vested with authority to negotiate at any time for a settlement and adjustment.

The Trustee, therefore, is properly in Federal Court, as conceded by petitioner, and has the right to have this case decided in the Federal Court under the decision of the Supreme Court of the United States in *Bullard vs. Cisco,* 290 U. S. 179, 78 L. Ed. 254.

While, in that case, a bondholder committee arrangement was involved, the Court found from the arrangement a trusteeship such as was set up here, and this decision squarely sustains the right of the plaintiff to maintain this action.

The action is brought to enforce the contract provisions of the bond set out in full in the complaint (R. 3-5), for the failure of duty on the part of the City of Huron to enforce the payment of the assessment certificates set out in detail in paragraphs 11 and 12 of the complaint (R. 1-14), the stipulation of facts (R. 32-52), and the findings of fact (R. 61-63), and although we believe that several of the items of such default and failure on the part of the City of Huron would, by themselves, be sufficient to authorize a recovery

by the plaintiff in this case, we shall confine our consideration of the matter at this time to the fact that the City of Huron never during any of the years of 1932 to 1938 made a valid or legal certification of the delinquent installments on the special assessments to the County Auditor of Beadle County, South Dakota, so that no valid sale could ever have been made by the County Treasurer of Beadle County, South Dakota.

The stipulation of facts upon which the findings of fact were based, and appearing on pages 32 to 52, transcript of record, after setting up the proceedings for the creation of the paving assessment district, the completion of the paving, the issuance of assessment certificates, to the City of Huron, which at all times remained its property, on pages 36 to 38, inclusive, show a most flagrant disregard by the City Auditor of the City of Huron of the duty of the City of Huron to collect these special assessment certificates in compliance with the pledge of its full faith and credit contained in the bond that this would be done, and they clearly show that the City having obtained the money to pay for the paving of the north end of its main street, that it had little, if any, concern about enforcing the payment of the special assessment certificates.

The certificates which were actually made by the City Auditor of Huron show that for the years of 1932, 1933, 1934, 1935, and 1936 (R. 38-43) were directed to the County Treasurer of Beadle County, South Dakota. The first two stated that they were made in accordance with Chapter 6402 of the 1919 Session Laws instead of the 1919 Code. That as to the certificate dated September 20th, 1932, all of the items of the descriptions, numbers, and amounts of the assessments were copied directly into the assessment book of the Treasurer of Beadle County, South Dakota, by the City

Auditor and in his own handwriting (R. 39). That as to the 1933 certification, the original thereof appears in the office of the County Treasurer of Beadle County, South Dakota (R. 41). That as to the certificate for 1934, the original thereof was placed in the County Treasurer's loose leaf special delinquent assessment book, and the certificate did not contain the seal of the City of Huron (R. 41-42). That the certificate for 1935 was attached to the original of the list of delinquent special assessments and the original thereof placed in the loose leaf special delinquent assessment book of the Treasurer of Beadle County (R. 42). That the certificate as to the 1936 delinquencies was attached to the original list made a part of the same record in the office of the County Treasurer of Beadle County. That none of these certificates were ever presented to or filed in the office of the County Auditor of Beadle County as required by law, and that as to none of these certifications for the years of 1932 to 1936, inclusive, did the County Auditor ever make a certification over to the County Treasurer of Beadle County, South Dakota, as required by law (R. 38-43).

That under date of October 1st, 1937, the City Auditor of Huron made a certificate; that the name "Treasurer" was scratched and the name "Auditor" inserted, and the County Auditor of Beadle County, South Dakota, for the first time and under date of October 4th, 1937, wrote a letter transmitting such list to the County Treasurer of Beadle County, South Dakota, and the original certificate and list became a part of the original record in the office of the County Treasurer of Beadle County, South Dakota, so that on the one occasion when the City Auditor of Huron did direct his certification to the County Auditor as provided by law, the County Auditor did certify the same to the County Treasurer (R. 43-44).

That under date of October 1st, 1938, the City Auditor of Huron made up a certification running to the County Auditor and County Treasurer of Beadle County; that the original certificate and original pages of special assessments therein referred to were a part of the original record of the office of the County Treasurer of Beadle County, and bear no evidence that the same were ever filed in the office of the County Auditor of Beadle County, and that no certificate was made by the County Auditor to the County Treasurer, and that there is endorsed on said list of delinquent special assessments "Received October 28, 1938, by Treasurer," which endorsement was placed thereon by the Deputy County Treasurer of Beadle County, South Dakota, showing the receipt of this list twenty-eight days after the time fixed by law for the filing thereof by the City Auditor with the County Auditor, and that then it was received by the Treasurer and not by the Auditor (R. 44).

These facts are fully found by the Court in paragraph 9 of the findings of fact (R. 61-63), and clearly show that the City of Huron did not in fact at any time, unless possibly in 1937, make the legal certification of the delinquent special assessments, and the Court was fully warranted in finding that no legal certification was made in any form for the years of 1932 to 1936, inclusive, a longer period than that covered in the McLaughlin case hereinafter referred to, and that neither of the other certifications were valid, and that the purported sale of a portion of the descriptions by the County Treasurer in 1935 was wholly void, so that the purported purchaser, Beadle County, on behalf of the City of Huron, acquired no rights whatever by such sale.

POINTS AND AUTHORITIES

Point 1. The petition for certiorari should be denied for the reason that there is no merit in it; that the issues involved do not bring it within any of the provisions of Subdivision 5 of Rule 38 of this Court; that the decision is based upon the South Dakota statutes and decisions and therefore could not be in conflict with the decision of the Tenth Circuit, also based upon construction of local law of another state.

McLaughlin vs. Turgeon, 75 F. (2d) 402.

City of Canton vs. Tinan, 104 F. (2d) 961.

Paine vs. Willson, 146 F. 488, 77 C. C. A. 44.

Detroit vs. Osborne, 135 U. S. 492, 34 L. Ed. 260.

Magnum Import Co. vs. Coty, 262 U. S. 159, 67 L. Ed. 922.

Ruhlin vs. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

Warren vs. Blackman, et al., 62 S. D. 26, 250 N. W. 681.

Bessemer Inv. Co. vs. City of Chester, 113 F. (2d) 571.

Denny vs. City of Spokane, (9th C. C. A.) 79 F. 719, 25 C. C. A. 164.

City of Brookings vs. Natwick, 22 S. D. 322, 111 N. W. 376.

Morrow vs. Reibe, 53 S. D. 330, 220 N. W. 870.

Subdivision 5, Rule 38, U. S. S. C.

Section 6409, R. C. 1919, as amended by Chapter 319, S. L. 1921, now Section 45.2114, S. D. C. 1939.

Chapter 199, S. L. 1929, now Section 45.2115, S. D. C. 1939.

Chapter 190, S. L. 1939.

Section 1967, R. C. 1919, now Section 37.1802, S. D. C. 1939.

Subdivision C of Rule 8 of Federal Rules of Civil Procedure.

Point 2. That the attempted method of the City Auditor of Huron to certify the delinquent installments of the assessment certificates was a nullity and everything done under it void; that the City did not in good faith collect the assessments; and that the appellee has a right to recover.

City of McLaughlin vs. Turgeon, 75 F. (2d) 402.

City of Canton vs. Tinan, 104 F. (2d) 961.

City of Canton vs. Retirement Board, 104 F. (2d) 963.

Huckstedt vs. Jamison, 59 S. D. 464, 240 N. W. 506.

Whittaker vs. City of Deadwood, et al., 12 S. D. 608, 82 N. W. 202.

McLauren vs. Grand Forks, 6 Dak. 397, 43 N. W. 710.

Wood vs. City of Hurley, 29 S. D. 269, 136 N. W. 107.

Coolsaet vs. City of Veblen, 55 S. D. 485, 226 N. W. 726.

Drennen vs. People, ex rel., 222 Ill. 592, 78 N. E. R. 937.

Craig vs. People, 193 Ill. 199, 61 N. E. R. 1072.

Biggins Estate vs. People, et al., 193 Ill. 601, 61 N. E. R. 1124.

Knudtson vs. Citizens National Bank & Trust Co., 62 S. D. 71, 251 N. W. 810.

Lyon vs. Alley, 130 U. S. 177, 32 L. Ed. 899.

Shipman vs. Forbes, 97 Cal. 572, 32 Pac. 599.

Cohn vs. Federal Const. Co., 171 Cal. 547, 153 Pac. 916.

Collier vs. Goessling, 160 F. 604, 87 C. C. A. 506. Certiorari denied, 215 U. S. 596, 54 L. Ed. 342.

Huiskamp vs. Breen, 220 Iowa 29, 260 N. W. 70.

Warden vs. Ratterree, 215 Cal. 215, 9 Pac. (2d) 215, 88 A. L. R. 1204.

Dougery vs. Bettencourt, et al., 214 Cal. 455, 6 Pac. (2d) 499.

Thompson vs. Auditor General, 261 Mich. 624, 247 N. W. 360.

Brase vs. Miller, 195 N. Y. 204, 88 N. E. 369.

Glos vs. Cass, 230 Ill. 641, 82 N. E. 827.

Devine vs. Wilson, 63 W. Va. 409, 60 S. E. 351.

Plaster vs. Harman, 70 W. Va. 634, 74 S. E. 905.

White vs. Hidalgo County Water Improvement District (Texas), 6 S. W. (2d) 790.

Parker vs. Maccue, 54 R. I. 270, 172 Atl. 725.

Morris vs. Card, 223 Ala. 254, 135 So. 340.

Craig vs. Swader, 225 Ala. 366, 143 So. 553.

Wildman vs. Enfield, 174 Ark. 1005, 298 S. W. 196.

Stade vs. Berg, 182 Ark. 118, 30 S. W. (2d) 211.

Peterson vs. Graham, 130 Ore. 290, 282 Pac. 1084.

Bays vs. Trulson, 25 Ore. 109, 35 Pac. 26.

Brady vs. Davis, 168 Cal. 259, 142 Pac. 45.

Reynolds vs. Fisher, et al., 43 Neb. 172, 61 N. W. 695.

Platte Valley Milling Co. vs. Malmsten, 79 Neb. 730, 113 N. W. 229, 79 Neb. 735, 116 N. W. 962.

Highlands vs. Johnson, 24 Colo. 371, 51 Pac. 1004.

STATUTES

Section 6402, Revised Code of South Dakota for 1919, as last amended by Chapter 187, Session Laws of South Dakota for 1929.

Section 6797, Revised Code of South Dakota for 1919.

Section 6799, Revised Code of South Dakota for 1919, as amended by Chapter 198, Session Laws of South Dakota for 1933.

Section 6804, Revised Code of South Dakota for 1919.

Section 12.0807, S. D. C. 1939.

Section 12.0816, S. D. C. 1939.
Chapter 198, S. D. 1933, Section 3.
Section 65.0103, S. D. C. 1939.

Point 3. That where there has been no valid and legal certification of the delinquent installments, or the City has failed to diligently enforce collection, the City has broken its pledge of its good faith in the collection of such special assessments and has made itself liable for the entire amount of the bonds, principal and interest.

City of McLaughlin vs. Turgeon (C. C. A. 8th), 75 F. (2d) 402.

City of Canton vs. Tinan (C. C. A. 8th), 104 F. (2d) 961.

Hauge vs. City of Des Moines, 207 Iowa 1209, 224 N. W. 520.

Grand Lodge vs. City of Bottineau, 58 N. D. 740, 227 N. W. 363.

Tillmann Co. vs. City of Seaside, 145 Ore. 239, 25 Pac. (2d) 917.

Miller vs. City of Scottsbluff, 133 Neb. 547, 276 N. W. 158.

New Orleans vs. Warner, 175 U. S. 120, 44 L. Ed. 96.

City of Cattletsburg vs. Trapp, 261 Ky. 347, 87 S. W. (2d) 621.

City of Cattletsburg vs. Cit. Nat. Bank, 234 Ky. 120, 27 S. W. (2d) 662.

Point 4. That the respondent is entitled to recover both principal and interest on all of the bonds, including those not yet due on their face, or, if not so entitled, is entitled to judgment for all principal and all interest, and to a declaratory judgment that the City of Huron is directly and prima-

rily liable for the bonds maturing November 1st, 1939, and 1940.

65 *A. L. R.* 1379.

87 *A. L. R.* 1205.

Aetna Life Ins. Co. vs. Haywerth, 300 U. S. 227, 81 L. Ed. 617.

Penn Mut. Life Ins. Co. vs. Forcier, 103 F. (2d) 166.

Columbia Nat. Ins. Co. vs. Folke, 89 F. (2d) 261.

Anderson vs. Aetna Life Ins. Co., 89 F. (2d) 345.

Sanford vs. Comr. Int. Revenue, 84 L. Ed. Adv. Sheet 53, decided Nov. 6th, 1939.

STATUTES

Section 400 of Title 28, Judicial Code of U. S.

Rule 57 of the Federal Rules of Civil Procedure.

The petitioner has submitted substantially its entire brief used on its appeal to the Circuit Court of Appeals in support of its petition, and has cited so many sections of the statutes and decisions that we feel compelled to answer them, although it requires a longer brief than should ordinarily be appropriate in opposition to a petition for certiorari.

ARGUMENT

Point 1. The Petition For Certiorari Should Be Denied For the Reason That There Is No Merit In It; That the Issues Involved Do Not Bring It Within Any of the Provisions of Subdivision 5 of Rule 38 of This Court; That the Decision Is Based Upon the South Dakota Statutes and Decisions and Therefore Could Not Be In Conflict With the Decision of the Tenth Circuit, Based Upon Construction of the Local Law of New Mexico.

The sole reasons assigned for the granting of the writ are that the decision is in conflict with that of the Circuit Court of Appeals for the Tenth Circuit, with the statutes of the State of South Dakota, and the decisions of the Supreme Court of South Dakota, as set out in Subdivision D, page 7, petitioner's brief.

There is no merit to this position because the decision is based upon two cases in which there was thorough consideration by the Eighth Circuit of four decisions of the South Dakota Supreme Court and of eight provisions of the statutes of South Dakota as set out at length in *McLaughlin vs. Turgeon*, 75 F. (2d) 402; that the case from the Tenth Circuit, *Gray vs. City of Santa Fe*, 89 F. (2d) 406, is also based upon the statutes and decisions of the State of New Mexico and squarely recognized the doctrine of the McLaughlin case as being sound under the facts upon which it was based, and that there is no decision of this Court in any way conflicting therewith.

This will necessarily require a careful consideration of the statutes of the State of South Dakota, only part of which have been set out in the petition, and of certain of the decisions of the South Dakota Court.

It clearly appears from the decision of the Circuit Court of Appeals (R. 75-80) reported in the September 9th, 1940, Advance Sheet of 113 F. (2d) 598, that the case sought to be reviewed was decided upon the statutes of the State of South Dakota and the former decisions of the Eighth Circuit in *City of McLaughlin vs. Turgeon,* 75 F. (2d) 402, and *City of Canton vs. Tinan,* 104 F. (2d) 961, and it seems clear to us from the provisions of Subdivision 5 of Rule 38 of this Court, as construed by this Court, that this being true, the fact, if it were a fact, which it is not, that the Tenth Circuit had arrived at a different result, would be wholly immaterial.

The McLaughlin case contains an exhaustive examination of the statutes of South Dakota relating to special assessment projects, special assessments, special assessment bonds, and the effect of the full faith and credit clause in the bonds involved in this case.

The sole question which was raised in the companion cases of *City of Canton vs. Tinan,* 104 F. (2d) 961, and *City of Canton vs. Retirement Board,* 104 F. (2d) 963, was that the decision in the McLaughlin case was contrary to the decision of the Tenth Circuit in *Gray vs. City of Santa Fe,* 89 F. (2d) 406, and the Circuit Court of Appeals on page 963 rightly found that the Gray case recognized certain controlling differences in the facts of the case before it for decision, and an analysis of the Gray case will show that that Court recognized that where the city has, by its neglect of duty, permitted a valid assessment to expire and become uncollectible, the city is liable for breach of duty or contract to pay the debt evidenced by the certificate or bond, citing, among other cases, *McLaughlin vs. Turgeon,* and six other cases outside of South Dakota which we had cited in our brief in the Circuit Court of Appeals, together with the two South Dakota cases chiefly

relied upon in the McLaughlin case, those of *Freese vs. Pierre* and *Coolsaet vs. Veblen,* and it clearly appears that the Federal Court of the Tenth Circuit reached the decision which it reached following the statutes of New Mexico and the decisions of the Supreme Court of that State, thereby clearly showing that our Court was right in the conclusion that it drew with relation to this case in its opinion in the Canton case.

The fact is that the Eighth Circuit in the McLaughlin case took great care to construe South Dakota statutes and to follow the decisions of the South Dakota court in arriving at its decision, with the result that, while the opinion in that case was written by Judge Gardner, who for more than thirty years was an outstanding authority on the tax laws of the State of South Dakota, the rule laid down by him in that case was concurred in by two Circuit judges, was followed in the Canton cases by two Circuit judges and a District judge, and in the case at bar by two Circuit judges and a District judge, so that we have seven separate Federal judges who have given this matter study, held that it was controlled by the South Dakota statutes and decisions, and carefully applied them.

In fact, this is not a new rule for the Eighth Circuit, because as early as *Paine vs. Willson,* 146 F. 488, 77 C. C. A. 44, the Court, in an opinion by Judge Walter H. Sanborn, passing upon the validity of a tax deed, and in holding that a tax deed was void where not even ditto marks appeared below the number of a township or range, followed the North Dakota Supreme Court and said that "the question which this specification of error presents is not whether or not this Court will be of the opinion that the description here presented was sufficient in the absence of controlling authority, but is whether or not the Supreme Court of North Dakota

has decided that such a description is fatally defective for the decision of that court upon such question establishes a rule of property in that State which must prevail in the Federal Courts," citing four cases of the Circuit Court of Appeals, and *Detroit vs. Osborne,* 135 U. S. 492, 10 S. Ct. 1012, 34 L. Ed. 260.

It is clear that the appellate court, when it decided the Canton cases on June 26th, 1939, and this case on July 9th, 1940, was sufficiently conversant with its duty under *Erie vs. Thompkins* and did not disregard those cases, as petitioner's counsel assert they did.

It appears to us that counsel have overlooked the basic theory of certiorari from this Court, and that, as said by the Court in *Magnum Import Co. vs. Coty,* 262 U. S. 159, 67 L. Ed. 922, "the jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The latest expression on the subject that we have seen is that of Justice Reed in *Ruhlin vs. N. Y. Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, where, on page 1292 of the L. Ed., after referring to the provisions of the rule permitting certiorari to issue on a showing of a conflict of circuits, it is said:

> "As to questions controlled by State law, however, conflict among Circuits is not of itself a reason for granting a writ of certiorari. The conflict may be corollary to a permissible difference of opinion in the State courts. The rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition."

It is significant that the McLaughlin decision was handed down on January 28th, 1935, while the legislature of the

State of South Dakota was in session, which session continued until the 4th of March following, and that there have been two regular sessions since then, those of 1937 and 1939, with no attempt made to pass any statute which would place a different construction upon our special assessment bond issues to be thereafter issued, assuming that under both the South Dakota cases and the Federal decisions that could not be done as to bonds theretofore issued.

It is further significant that Section 6409 of the Revised Code of 1919, as amended by Chapter 319 of the Session Laws of 1921, permitting municipalities to issue their negotiable bonds in an amount equal to the entire assessment, and sell the same at not less than par, with accrued interest, to pay the cost of improvement, was not only not repealed but was carried into the codification of the laws when the new Codes were adopted at the 1939 session of the legislature as Section 45.2114 thereof.

And it is even more significant that the provisions of Chapter 199 of the Session Laws of 1929, which provide, "The portion of the cost of public improvements to be paid by the municipality either as the public assumption of a part of the cost, the payment of an assessment levied against property owned by the municipality or the United States Government *or because of the municipality being required to purchase any past due unpaid Special Improvement Bonds issued in accordance with the provisions of Section 6409 of the South Dakota Revised Code of 1919, as amended*, may be paid out of funds of the municipality not otherwise appropriated, or the governing body of the municipality may and is hereby authorized to issue bonds to an amount not exceeding one-half of one per cent of the valuation of all the property in the municipality as equalized for taxation purposes within the year preceding the date of issuance of said

bonds," was not only not repealed but was carried into the 1939 Code as Section 45.2115, with the sole addition of these words, "after authorization and in the form and manner provided for general obligation bonds," with the remainder of the section providing for the handling of funds received from such bonds.

Then, again, we find that, after expressly recognizing that a city or town may be liable to pay its special assessment bonds, as the legislature did in each of the Acts above set out, Chapter 190 of the Session Laws of 1939 was enacted amending Chapter 45.2119, S. D. C. 1939, to read as follows:

> "That the governing boards of cities and towns in this state be, and they are hereby authorized and permitted to compromise any special assessment against lots, or parcels of real estate, situated in such cities or towns when the city or town is the owner of Special Assessment Certificates against such real estate or lots or when bonds of such cities or towns were or are issued in lieu of Special Assessment Certificates and such bonds were or are retired by the cities or towns *as their obligations.* Provided, however, that such compromise cannot reduce the amount of such special assessments less than the principal amount of the special assessments."

Certainly, all of these provisions of the Code and this 1939 amendment would be idle if the legislature of the State of South Dakota did not recognize a liability of its cities and towns on their special assessment bonds.

The soundness of its construction of Rule 38 by this Court in the Ruhlin case is particularly illustrated by the fact that this Court now is asked to substitute its judgment of whether or not the South Dakota law has been followed for that of seven judges of the Circuit Court of Appeals of the Eighth Circuit, and the Federal District judge, the various judges

who are continuously in touch with the laws of the State of South Dakota.

The Supreme Court of South Dakota as late as October 26th, 1933, in *Warren vs. Blackman, et al.*, 62 S. D. 26, 250 N. W. 681, considering the special assessment law of South Dakota, said on page 683:

> "It is made the duty of the City Auditor under the provisions of Section 6402, Rev. Code 1919, as amended by Chapter 187, Laws 1929, to certify to the County Auditor prior to the 1st day of October all special assessments remaining unpaid which become due or delinquent on or before the 15th of September. Section 6797, Rev. Code 1919, provides that, whenever delinquent special assessments shall be certified to the County Auditor, it shall be his duty to immediately certify the same to the County Treasurer, and that delinquent special assessments shall be collected by the County Treasurer by sale of the lots or parcels assessed at the next succeeding sale of real property for delinquent taxes. This section further provides that 'sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the County Treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales'."

This furnishes a solid foundation for the view of the Circuit Court of Appeals in this case of the duty of the City Auditor with relation to delinquent special assessments.

The rule stated in *Freese vs. Pierre*, *Coolsaet vs. Veblen*, and the numerous decisions of the Eighth Circuit Court of Appeals, set out in *Turgeon vs. McLaughlin*, *supra*, on p. 410 of the 75 F. (2d) that a city which agrees to pay out of special assessments, and then either fails to create them or to

collect them, is liable for the contract price or the amount of the bonds, with interest, is proper both under the common law and the provisions of Section 1967 of the 1919 Code of South Dakota, which reads, "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon," which has continued to be the law and was carried forward as Section 37.1802 S. D. C. 1939. It is the only rule of law that could apply to this class of obligation, notwithstanding the persistent effort of petitioner to claim the contrary by the citation of numerous sections of the statutes which do not apply, and the omission of this section.

The decision in the McLaughlin case relies upon the decisions of the South Dakota Supreme Court in *Freese vs. City of Pierre,* 37 S. D. 433, 158 N. W. 1013, and *Coolsaet vs. City of Veblen,* 55 S. D. 485, 226 N. W. 726, and it is clear that in each of these cases the South Dakota Supreme Court held that, where the city had delivered its special assessment certificates in payment of the contract price for a special improvement, when it became impossible to collect the special assessment certificates that the city was liable for the full contract price with interest, and in each of those cases the South Dakota Court specifically established this remedy.

Counsel for the petitioner have attempted in a number of places in their brief to distinguish these cases by saying that in each of them the contractor who received the original certificates had brought the suit, implying that he would have greater rights than a bondholder who furnished the cash to the city to pay for the improvement.

It requires no citation of authority or proof to support the statement that, where the certificate holder was the contractor who had made his bid knowing that he would have to take special assessment certificates in payment, instead of

being paid in cash out of the proceeds of the sale of bonds, as was done here, under the alternative method in South Dakota, he invariably took into account the probable losses on collection of assessment certificates, and the contract price was higher by that amount so that the city as a whole benefited by obtaining the bids on a cash basis.

On page 46, petitioner's brief, Section 1319 of the Political Code of 1903, is set out, with the statement that the Freese decision was influenced by this statute, which was not carried into the later codification. While this section is set out in the Freese case, the Supreme Court refused to follow it, and instead adopted the measure of damage set out in *Barber Asphalt Paving Co. vs. City of Denver,* (8 Cir.), as conclusively appears from the following statement taken from pages 1015-1016 of 158 N. W.:

> "It seems to be the generally accepted rule that, in the absence of express provision to the contrary, a municipal corporation impliedly contracts to cause a valid assessment to be made when it enters into a contract for a street improvement which is to be paid for by special assessment, and that, when an assessment is invalid because of some defect in the proceedings which is chargeable to it, the municipal corporation is holden to the contractor. We are of the opinion that the above rule is a reasonable one and that it is applicable to the case before us. Some of the principal authorities for these views are *Barber Asphalt Paving Co. vs. City of Denver,* 72 Fed. 336, 19 C. C. A. 139; *District of Columbia vs. Lyon*, 161 U. S. 200, 16 Sup. Ct. 450, 40 L. Ed. 670; *Gilcrest vs. City of Des Moines,* 157 Iowa 525, 137 N. W. 1022; *Pine Tree Lumber Co. vs. City of Fargo,* 12 N. D. 360, 96 N. W. 357; *Rogers vs. City of Omaha,* 82 Neb. 118, 117 N. W. 119; *Terrell vs. City of Paducah,* 122 Ky. 331, 92 S. W. 310, 5 L. R. A. (N. S.) 289; *O'Neil vs. City of Portland,* 59 Ore. 84, 113 Pac. 655; *Hamilton on Spe-*

cial Assessments, Sec. 671-675; *Page & Jones on Taxation by Assessment,* Sec. 1507. In *Barber Asphalt Paving Co. vs. City of Denver, supra,* the United States Circuit Court of Appeals for this circuit, said:

"'If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds realized or to be realized by assessments upon abutting property, the city is primarily and absolutely liable to pay the contract price itself, if it has no power to make such assessments, or if the assessments it attempts to make are void.'

"It further clearly appears that the city might be holden to the contractor upon an entirely different theory than the one above set forth, and the pleadings and evidence are adequate to uphold a decision under this other theory. The city assigned to plaintiff, on July 23, 1910, treasurer's sale certificates aggregating the sum of $4,825.25 on the property in question issued to it under the sale held on March 7, 1910. It will be noticed that this aggregate sum was considerably in excess of the amount then due on the Fanebust contract. Section 1319, Pol. Code, provides:

"'Whenever a special assessment for a local improvement shall be set aside or declared null and void by a court of competent jurisdiction, the city shall save the purchaser at the sale for said special assessment harmless, by paying him the amount of the principal which he paid upon such sale, together with interest at 12 per cent per annum from the date of sale.'

"If, then, the city had authority to assign those certificates to plaintiff, he then occupied the same position with reference to them as a purchaser at the treasurer's sale would have occupied, and he would now be entitled to the amount of the certificates with 12 per cent interest, and this without regard to the claim of the city that

> plaintiff took said certificates in full settlement of the contract. If plaintiff were allowed judgment on that theory, the amount would be greatly in excess of the amount adjudged to be due him by the trial court."

Nothing could more clearly show that the Supreme Court of South Dakota approved of the earlier decision of the Eighth Circuit Court of Appeals, and did not base the Freese decision on Section 1319 of the Political Code.

It is to be noted that in that case the Court rendered judgment for the full amount due against the City, although in the same action it ordered a re-assessment for the benefit of the city and did not attempt to find a value of the re-assessment or reduce the judgment accordingly.

This not only leaves the statement made on page 46, petitioner's brief, "it indicated a statutory policy of liability, since repealed, which reveals, if anything, a legislative policy to exempt cities from liability to remit the purchaser to his remedy against the property provided by Section 6412, Rev. Code 1919," wholly without support in the Freese case, but exceedingly misleading because these assessment certificates at all times belonged to the City, the bondholder had no lien on them and no right to sue on them, nor to take any other proceedings on them, so it was the City of Huron, as the owner of the assessment certificates which had and has all rights under this statute.

The Coolsaet case is criticized on page 47, petitioner's brief, with the statement that, it is complicated by the fact that the City had entered into a stipulation for judgment, which criticism is unwarranted by reason of the specific finding of the Court that the stipulation would not be valid unless the City owed the debt. And then the Court specifically finds as one of the reasons why the assessment certificates which had been

issued to pay for an improvement were void was the failure of the proper officer to certify a copy of the assessment roll describing the properties assessed to the County Auditor, and in sustaining a judgment for the contractor for the water mains for the entire amount of the contract price the Court on page 727 of the N. W. said:

> " * * * After completion and acceptance of the work, the city issued to respondents the assessment certificates, but they proved to be null and void by reason of procedural defects, and the failure of the proper officer to certify a copy of the assessment roll, describing the properties assessed, to the County Auditor, on account whereof the special assessment was not spread upon the tax books and made a lien against the said properties. * * * "

This case was decided in 1929, or ten years after petitioner says that Section 1319 was repealed by omission from the 1919 code, yet the Court on page 728 said, "consistent with the principles applied in *Freese vs. Pierre*, 37 S. D. 433, it must be held that the plaintiffs were entitled to recover judgment for the amount of their contract and interest."

When petitioner says on page 42, petitioner's brief, that there was no inquiry as to the amount of the damages, and argues that this was error, it overlooks the rule laid down both by the South Dakota Court and the Eighth Circuit that when such contracts were violated the certificate holder or bondholder need not prove the value of each piece of property and the amount of the general taxes against it.

Petitioner also overlooks the fundamental rule that it having possession of the facts, it was its duty to plead and prove them if it thought they would mitigate its damages, although, in plain point of fact, an attempt on its part to show value of lots would have shown that nine years of accumulation of general taxes, which were paramount to the

assessment certificates under the decision of the South Dakota Supreme Court in *Warren vs. Blackman*, 62 S. D. 26, 250 N. W. 681, amounted to more than the cash value of the lots.

That it was the duty of the City to plead any facts constituting mitigation of damages is clear from Subdivision (c) of Rule 8 of the Federal Rules of Civil Procedure.

It would also be the City's duty to plead and prove a defense that there was some collectibility left in the special assessment certificates under the universal rule that the burden of such proof is upon the one having possession of the records and the facts.

The rule is clearly set out in *Bessemer Inv. Co. vs. City of Chester*, 113 F. (2d) 571, on p. 576, in this language:

> "It is clear, we think, that the city's duty of diligence required it to force collection by all available legal means, unless resort to such means would be ineffectual, in which case the city must demonstrate that ineffectuality."

That the delay of the City in making a valid certification of the delinquent special assessments, and the change of the time of the redemption from two to four years from the date of the sale, in itself was sufficient to make the City liable, is carefully shown in the cases analyzed and digested in *Grand Lodge vs. City of Bottineau*, 58 N. D. 740, 227 N. W. 363, cited as one of the main authorities in the McLaughlin case, and in addition to this case on this subject we cite *Denny vs. City of Spokane* (9th C. C. A.), 79 F. 719, 25 C. C. A. 164.

On page 38, petitioner's brief, is cited the case of *Moore vs. City of Nampa*, 276 U. S. 535, 72 L. Ed. 688, with the statement that "this Court held that the cause of action of

the bondholder in a case such as this is not on contract, but is in tort based on negligence."

The reason why the bondholders were non-suited in the Nampa case was because the action was brought in tort in an attempt to hold the City liable for a false and fraudulent certificate made by the city officers who were not required by law to make any certificate of the kind, and because of the fact that the Idaho law had been amended to specifically provide that the bonds transfer to the owner or holder all of the right and interest of the municipality in and with respect to every such assessment and lien and authorize the holder to receive, sue for, and collect or have collected such assessment embraced in any such bond (no such provisions were in the South Dakota law), and the finding on page 690 of the L. Ed., "It is clear that respondent's faith or credit is not pledged," as it expressly was in the case at bar, so that the McLaughlin opinion distinguishing this case did so on an absolutely sound basis.

The statement made on page 35, petitioner's brief, "indeed a local Court would have known judicially that even in prosperous times nearly all property sold for delinquent taxes is purchased by the County," would hardly be made to a local Court because counselor unquestionably knows that for a period of years, when general tax sale certificates in South Dakota drew twelve per cent interest, that a fellow-resident of Huron, South Dakota, repeatedly bid down all of the certificates offered in whole counties to as low as four per cent interest in order to get all of the certificates offered.

The statement made on page 32, petitioner's brief, "it having been shown that property and property-owners remain liable," is not a correct statement because the South Dakota Court has held in *City of Brookings vs. Natwick,* 22 S. D.

322, 111 N. W. 376, that the owner of property is never liable for a special assessment, and that the property alone is liable.

The Court on page 323 of the South Dakota Reports said:

> " * * * There being no contract or promise express or implied, the obligation of the owner is not in the nature of a debt that would have been recoverable by a common-law action of *assumpsit*. That a special assessment is greater than the special benefit conferred may or may not be a valid objection to its enforcement by a sale of the abutting property, but when it exceeds the value of such delinquent property after the local improvement has been completed, the subjection of all other property the owner may possess to execution in satisfaction of a judgment for such assessment is wholly inconsistent with the supposition that he is receiving a special benefit. * * * "

On page 5, petitioner's brief, it is stated that the 1937 and 1938 certifications by the City Auditor were to the County Auditor, which is not correct because the 1938 certification was addressed to the County Auditor and the County Treasurer of Beadle County and the original filed in the office of the County Treasurer bearing no evidence that it had ever been in the hands of the County Auditor, and it was not certified by him (R. 62).

The stipulation of facts (R. 35 to 38) shows a long continued, direct, positive and intentional violation of the laws of South Dakota in the handling of these special assessments, and in the one case shown in the last three lines on page 35 and the first three lines on page 36, with no name on the assessment roll, made any purported sale of that item wholly void under the decision of the Supreme Court of South Dakota in *Morrow vs. Reibe,* 53 S. D. 330, 220 N. W. 870, where the Court said: "The entire omission of the name of the person to whom the property is taxed in the assessment roll in the

duplicate tax list, and in the notice of tax sale, in our opinion renders the tax sale void."

If it should be thought that there was still a possibility that certiorari should be granted to reconcile conflicts in the decisions of different Circuits, the *Bessemer Investment Co. vs. City of Chester,* and eleven other cases (C. C. A. 3), 113 F. (2d) 571, Advance Sheet, September 9th, 1940, should be considered because that case contains one of the most exhaustive considerations of this whole special assessment bond subject to be found anywhere, and it squarely and clearly shows that its decision was based upon the Pennsylvania law, as was the case at bar on the South Dakota law, and the case merits reading because of its very careful and thorough analysis of the fallacy of the argument of petitioner that there is any equity in releasing a city from paying for pavement which it has received and is using, with its repeated quotations from and references to the articles in the 44 Harvard Law Review 610, the 37 Columbia Law Review 177, the Problem of Special Assessments, and 23 National Municipal Review 466. If this case is considered it should be kept in mind that the record in the case at bar does show exactly what remains of the special assessments; that in the period of more than five years from May 1st, 1935, to September, 1939, the City had collected in $2,150.00 on these assessments, which was paid over to the plaintiff prior to the entry of the judgment in the District Court, and that if anyone can collect the assessments it is the City of Huron, so the damage element was fully established in the case at bar.

It should also be kept in mind that the last three bonds mature on November 1st, 1940, and that there is no money to pay them, so that there would need be no remand of this case to determine the effect on the unmatured bonds if the conclusion of both the lower courts was found to be wrong

that the face and accrued interest on the debt represented by the bonds, became due when the City breached its full faith and credit covenant.

In any event no harm could possibly come to the City because the plaintiff asked for and is entitled to a declaratory judgment declaring its direct and primary liability for the remaining principal and interest if the same could not be properly included in the original judgment, as fully argued in point four.

Point 2. That the Attempted Method of the City Auditor of Huron to Certify the Delinquent Installments of the Assessment Certificates Was a Nullity and Everything Done Under It Void; That the City Did Not In Good Faith Collect the Assessments; and That the Respondent Has a Right to Recover.

More concisely stated, the attempted certification of delinquent installments by the City Auditor of Huron directly to the County Treasurer of Beadle County, South Dakota, was a plain violation of the mandatory language of the statutes of this state, and was wholly null and void, and therefore the City of Huron is in identically the situation that this Court found the City of McLaughlin in, in *City of McLaughlin vs. Turgeon* (C. C. A. 8th), 75 F. (2d) 402, and the situation of Canton in *City of Canton vs. Tinan* (C. C. A. 8th), 104 F. (2d) 961, so that while in these cases the decision turns upon the fact that no certification was made during certain years, the situation in this case is identical because the purported certifications were wholly null and void.

We will not burden the Court with a citation or a consideration of the cases which are cited in the *Turgeon vs.*

McLaughlin case, and will so far as possible confine this part of this brief to a consideration of the authorities supporting our contention that in legal effect there was no certification whatever of these delinquent special assessments.

The statutory method of handling these matters is set out in Section 6402 of the Revised Code of 1919, as amended by Chapter 269 of the Session Laws of 1919, and Chapter 187 of the Session Laws of 1929, and reads as follows:

> "CERTIFYING DELINQUENT ASSESSMENTS. It shall be the duty of the city auditor or town clerk, between the fifteenth day of September and the first day of October in each year, to certify to the county auditor of the county in which such municipality is located, all special assessments remaining unpaid, which became delinquent on or before the fifteenth day of September of that year."

Section 6797 of the same Code provides:

> "SPECIAL ASSESSMENTS IN CITIES AND TOWNS. Whenever delinquent special assessments levied in any city or incorporated town shall be certified to the county auditor as provided in article 6, chapter 9, part 8, of this title, it shall be the duty of such auditor to immediately certify the same to the county treasurer, and such delinquent special assessment shall be collected by the county treasurer, by sale of the lots or parcels of land so assessed at the next succeeding sale of real property for delinquent taxes, in the same manner and at the same time and place.

The balance of Sections 6402 and 6797 are important and are set out in full on pages 76-77 Record.

It will be noted that in both of these sections the language is mandatory that the City Auditor shall certify the delinquent installments to the County Auditor, and that the County Auditor shall certify them to the County Treasurer,

and that the County Treasurer shall proceed to sell them, and that these sections apply to all installments delinquent on September 15th of each year.

It should be perfectly patent that if the County Treasurer of Beadle County, South Dakota, had attempted to make a sale of these installments upon a certification directly to him from the City Auditor of the City of Huron, all of his proceedings would have been a nullity, and that therefore it is not the default or neglect or failure of duty of the County Treasurer which is involved, but the neglect and failure of duty upon the part of the City's own officer, its City Auditor, and that this failure is a direct violation of the good faith clause of its bond.

It is also evident that it was the plain intent of the Legislature of this state to provide that the County Treasurer should only sell special assessment installments upon the certification of them to him by the County Auditor of the county, the same official who, by the other sections of our statutes, certifies to the County Treasurer for collection all the general taxes, and this section is so plain and so mandatory that it would have been a matter of ease to have complied with it, and that the failure to comply has rendered the City liable for the entire amount due on these bonds.

The Supreme Court of the State of South Dakota has passed directly upon this precise question, and has repeatedly held that the provisions of these taxing statutes and of the proceedings to divest title through tax and special assessment proceedings are mandatory and must be strictly construed, and we proceed, first, to set out briefly this line of cases, and the line of cases outside of the state holding that the provisions of statutes like these providing for certification by certain officials to certain other officials are mandatory, and that any tax sale proceeding taken without a strict

compliance therewith is wholly void.

The South Dakota Supreme Court in *Huckstedt vs. Jamison*, 59 S. D. 464, 240 N. W. 506, considered the validity of a tax deed, and, in holding that the failure of the County Treasurer to file the tax certificate with the County Auditor was a fatal error voiding the tax deed, said:

> "(2) The rule of construction prevailing in this State was very aptly stated in *Salmer, et al., vs. Lathrop, et al.*, 10 S. D. 216, 72 N. W. 570, 573: 'It seems to be well settled that all legislative enactments appertaining to proceedings to transfer and divest title to real property for nonpayment of taxes must receive a strict construction, and, in the absence of a statute affording relief, the doctrine of *caveat emptor* is applied to purchasers at tax sale.'
>
> "(3) Appellant further contends that the County Treasurer failed and neglected to cancel the tax sale certificates, and that they were not filed by or in the office of the County Auditor, as provided for by Section 6808, South Dakota Revised Code 1919. Section 6808, South Dakota Revised Code 1919 provides: 'When deeds are delivered by the County Treasurer for real property sold for taxes, the certificate therefor must be canceled and filed by the County Auditor, and in case of loss of any certificate, on being satisfied thereof by due proof, and bond being given to the State in a sum equal to the value of the property conveyed, as in cases of lost notes or other commercial paper, the County Treasurer may execute and deliver the proper conveyance and file such proof and bond with the County Auditor.'
>
> "It is hard to conceive under the construction prevailing in this state and other states having similar statutes, and the mandatory language contained within the sections above referred to, how we can sustain the findings and conclusions of the trial court. The law as we find it is opposed to the findings and conclusions made by

the trial court, and we must reverse respondent's judgment entered by the trial court.

"We cannot agree with respondent that the purpose of the statute is merely to direct the treasurer to file such certificate with the auditor and that it was designed to secure order and system in the conduct of business devolved upon them, and that a disregard by the officials could not injure interested parties on account of the officials' neglect. The appellant is entitled to the full observance of the law, and his rights must prevail as against the proceedings shown by the record."

In *Whittaker vs. City of Deadwood, et al.*, 12 S. D. 608, 82 W. 202, the Court said on page 613:

"It is further contended on the part of the appellant that the proceedings of the city were illegal for the reason that the property was not sold at the time specified in the charter. The charter in force at that time provided for a sale of the property of delinquent taxpayers on the first Mondays of December and March in each year. The sale in this case was made on the 20th of December. This was not a compliance with the statute. It is a well settled rule that when municipal corporations seek to impose upon property owners the burden of the cost of street improvements, and to hold the property of abutting owners liable therefor, the constitution, statutes, and charter authorizing such improvements must be strictly complied with. *Mason vs. City of Sioux Falls*, 2 S. D. 640, 51 N. W. 770. '*When the statute under which the sale is made directs a thing to be done, or prescribes the form, time, and manner of doing anything, such thing must be done, and in the form, time, and manner prescribed, or the title is invalid, and in this respect statutes must be strictly, if not literally, complied with.*' *Chandler vs. Spear*, 22 Vt. 398; *Cooley, Tax'n*, 287; 2 *Desty, Tax'n*, 842. Why the sale was not made at the time designated in the law, we are not able

to say; but as the time was fixed by law it was the duty of the city officers to make the sale at the time prescribed."

The Supreme Court of Dakota in *McLauren, et al., vs. City of Grand Forks,* 6 Dak. 397, 43 N. W. 710, cited with approval in *Mason vs. Sioux Falls,* 2 S. D. 647, 51 N. W. 770, on page 711 said:

"* * * The object of this law was to provide a method where, under certain specified conditions, private property may be assessed and taxed for the payment of the expenses of necessary public improvements. Such statutes are in derogation of the common law, and must be construed strictly, and the conditions imposed observed and performed specifically. The omission of any of them is fatal to the legality of all proceedings attempted to be had under it. *Merritt vs. Village of Portchester,* 71 N. Y. 309; *Doughty vs. Hope,* 3 Denio 594; *Sharp vs. Johnson,* 4 Hill 92. * * * "

The Supreme Court of South Dakota in *Wood vs. City of Hurley,* 29 S. D. 269, 136 N. W. 107, on page 283 of the South Dakota Report, holds that the certificate of the City Auditor transmitted to the County Auditor was valid and in proper form, and sets out the form and contents of such certificate.

Except in so far as they attempt to attack the method by which the damage of the plaintiff was established, which was in strict conformity to that approved in the McLaughlin and Canton cases, the only real attempt made by the petitioner to distinguish this case from either of those cases is upon the contention that the provisions of Section 6402 of the Revised Code of 1919, as amended by Chapter 269 of the Session Laws of 1919, and Chapter 187 of the Session Laws of 1929, and Section 6797 of the 1919 Code, with their mandatory requirements that the City Auditor shall certify to the

County Auditor, who shall in turn certify to the County Treasurer, should not be held to be mandatory in spite of what the South Dakota Court and the Circuit Court of Appeals have said was the plain meaning of the South Dakota tax statutes, because they say the County Auditor was not required to make any record in his office or to do anything further about the matter.

If this were true, it would still not be a defense under the South Dakota decisions above set out, or the decisions of this Court and universally from the other states hereinafter set out, and counsel have quite patently overlooked several important sections of the statute in attempting to frame an argument on this point.

The concluding portion of Section 6797 clearly shows that after the special assessments have been certified to the County Treasurer by the County Auditor that all of the proceedings thereafter taken by the County Treasurer are to be identical with those for the collection of the general real estate and other taxes, and that the same period of time to redeem shall be allowed.

Under the express provisions of Section 6799 of the 1919 Code, as amended by Chapter 198 of the Session Laws of 1933, but with this provision unchanged, it was specifically provided that in case of redemption from a sale that, after the receipt of the money paid, "the Treasurer shall enter a memorandum of the redemption in the list of sales and give a receipt therefor to the person redeeming the same, and file a duplicate of the same with the County Auditor, as in other cases."

If the County Auditor did not as a matter of necessity make a record of the special assessments when properly certified to him, what good would it do to provide that in case of redemption therefrom a duplicate of the receipt should

be filed by the County Treasurer with the County Auditor?

Section 12.0807, S. D. C. 1939, which was Section 5927, Revised Code 1919, provides:

> "DUPLICATE RECEIPT BOOK: RECORD OF RECEIPTS OTHER THAN TAXES; RECEIPT TO PAYER; COPY FILED WITH AUDITOR; ENTRY IN CASHBOOK. Whenever the treasurer receives any money, warrants or orders on any account other than taxes charged on the tax duplicate, he shall make out duplicate receipts for the same, one of which shall be delivered to the person paying such money, warrant, or order and the other shall within one week be filed by the treasurer with the auditor in order that the treasurer may be charged with the amount thereof. The treasurer shall then enter the same in his cashbook provided in the preceding section, as in the case of money received for taxes but in a separate and distinct series of numbers of receipts issued therefor."

The reference in this section to any account other than taxes charged on the tax duplicate specifically makes it cover special assessment certificates, and, again, we ask, if the County Auditor does not have the original delinquent assessment list how can he check the duplicate receipts when they are furnished to him by the County Treasurer?

Section 12.0816, S. D. C. 1939, which was Section 5931, Revised Code 1919 unchanged, provides:

> "MONTHLY SETTLEMENT BETWEEN TREASURER AND AUDITOR: DETERMINATION OF BALANCES DUE TAXING DISTRICTS; APPORTIONMENT AND ORDERS FOR PAYMENT. On the first day of each month the county treasurer shall turn over to the county auditor all vouchers for disbursements made by him during the preceding month taking the auditor's receipt therefor and the auditor shall forthwith charge the proper funds therewith and within ten days thereafter the auditor and treasurer shall compare their cashbook and ledger balances and

the auditor shall immediately thereafter, on the application of any township, city, town, or school treasurer, deliver to such treasurer an order on the county treasurer for the amount due such township, city, town, or school district; provided that the person so applying shall file with the auditor a certificate from the proper officer showing that such person is duly elected or appointed treasurer and has given bond as required by law."

These sections so clearly show that the Auditor must have this assessment list in his office in order to comply with them that the entire argument of the petitioner that, simply because this particular County Auditor kept no record the City could not be charged for its failure to provide him with one, is entirely without merit.

While the following section of the South Dakota statute should probably more properly be set out in connection with the portion of this brief dealing with the question of actual damage, we think it fits in better in this portion of the brief, and that is that under the provisions of Section 6804 of the Revised Code of 1919 the period of redemption from a tax or assessment sale was two years, or until such time thereafter as the owner served notice to take tax deed, and sixty days thereafter had intervened.

While South Dakota had this two-year redemption period, it is a matter of common knowledge that private investors bought most of the taxes and assessments which were offered for sale.

By Section 3 of Chapter 198 of the Session Laws of 1933 of South Dakota this period of time was changed to four years, and such time thereafter up to six years until notice might be given, so that when this purported sale was made in 1935 it was made at a time when the law required a pur-

chaser to hold his certificates at least four years and sixty days before he could obtain a tax deed and possession, so that while, if these properties which were delinquent to the number of thirty-two, with the total assessment represented by the thirty-two installments, $9,982.80, had been properly certified and had properly been sold in December, 1932, the buyer could have obtained title and possession of the property by February of 1935, while, as this matter was handled, if it could be found by any possible construction that the 1935 sale was valid, a buyer at that sale could not have obtained title before February, 1940, or five years later.

If proper proceedings had been taken, so that notices to take tax deeds could have been served in December, 1934, it would undoubtedly have forced many of the property owners to pay before the general property taxes had accumulated to the point where there was no equity in the property.

Section 6804, Revised Code of 1919, so far as material, provided:

> "If real property sold for taxes be not redeemed within two years from the date of sale, at any time thereafter and within six years from the date of the tax sale certificate on which the proceedings are based (then follow the provisions for giving notice of intention to redeem) and until sixty days after the service of such notice, the right of redemption from such sale shall not expire. * * * Immediately after the expiration of sixty days from the date of the completed service of the notice hereinbefore provided, the treasurer then in office shall make out a deed for each lot or parcel of real property sold, and remaining unredeemed."

Section 3 of Chapter 198 of the Session Laws of South Dakota for 1933 changed this section in the first three lines, to read: "If real property sold for taxes be not redeemed within four years from the date of sale * * *," etc.

We think it also common knowledge that where general taxes drew eight per cent after delinquent, as they did in South Dakota, and special assessment one per cent per month, that one did not permit special assessments to run at a higher rate and pay the general taxes which were at all times a first lien on the property, so that entirely independently of other authority, it conclusively appears that the petitioner's argument that it would be equitable to disregard this mandatory requirement of certification is wholly without merit.

That our construction of the South Dakota tax laws is correct, finds further support in the decision of the South Dakota Supreme Court in *Knudtson vs. Citizens National Bank & Trust Co.*, 62 S. D. 71, 251 N. W. 810, where in paragraph 4 of the opinion on page 813, the Court said:

> "The County Treasurer could not proceed in any way to collect the tax until it was charged against the taxpayer on the books in the County Auditor's office and a duplicate furnished to the County Treasurer."

This related to a money and credit tax, but it applies to all taxes and assessments in this state and serves to emphasize the provisions of Sections 6402 and 6797 of our Code.

Section 65.0103, S. D. C. 1939:

> "The evidence of the common law, including the law merchant, is found in the decisions of the tribunals.
>
> "In this state the rules of the common law, including the rules of the law merchant, are in force, except where they conflict with the will of the sovereign power, expressed in the manner stated in Section 65.0102."

We take up next the decisions of the United States Supreme Court, and then of a group of other states, for the purpose of showing that the broad language used by the

South Dakota Supreme Court and its territorial predecessor is in fact the universal rule, and we do this also because of the fact that in many of these cases the precise question was whether or not a statute or charter provision for certification was complied with.

The United States Supreme Court in *Lyon vs. Alley*, 130 U. S. 177, 32 L. Ed. 899, considered the validity of a tax deed based upon special assessment improvement certificates for paving, and in holding that the tax deed was void laid down the following rules as to the effect of a failure to observe the statutory provisions for assessment and certification of the assessments on page 902 of the L. Ed.

> "To the correctness of these rulings the appellant's counsel have raised several objections, which it is necessary to consider. It is contended that the requirements of the statute, which were not complied with, were mandatory only so far that it was necessary they should be substantially observed; and that unless some injustice has been done or some inequality occasioned, equity will disregard a mere failure to follow the law. This proposition presents the question whether the failure of the commissioner to deposit with the register a statement of the taxes upon the lots, the failure of the register to place without delay in the hands of the collector a list of the persons taxed, and the failure of the collector to give the required notice to such persons, constituted such a non-observance of the requirements of the statute as to render invalid, as against the appellee, the tax sale and the certificates thereof issued to the appellant.
>
> "In view of the specific and imperative language of these provisions, and more especially of their nature and obvious purpose, we cannot doubt that they were intended as conditions precedent, a strict compliance with which was necessary in order to make the tax chargeable as a lien upon the lots. This question was directly presented and distinctly settled in the case of *French vs.*

Edwards, 80 U. S. 13 Wall. 506 (20:702), in which the rule was laid down with regard to directory and mandatory provisions of tax laws, which has been since approved by the federal and state courts. * * *

"* * * 'But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.'

"Judge Cooley in his work on Taxation refers to this case and says: 'The doctrine therein stated seems a sound and just rule, and may be reasonably believed to be in accord with the legislative will in the cases to which it is applied.' Chief Justice Shaw, in the earlier case of *Torrey vs. Millbury,* 21 Pick. 64, lays down the same rule in nearly the same terms."

The Circuit Court of Appeals of the Sixth Circuit in *Collier vs. Goessling,* 160 Fed. 604, 87 C. C. A. 506, construed the Tennessee law providing that the County Trustee makes public sale of lands subject to delinquent taxes, and is required to strike off to the State Treasurer all lands or lots so sold when the full amount of the tax penalties and costs are not bid at the sale by some private person, and that he shall then file with the Clerk of the Circuit Court of his county a certified list of the lands so struck off, containing certain information, and the Court reviews a group of Tennessee decisions, in some of which the list, when filed by the Trustee with the Clerk of the Circuit Court, had not been certified as the act required, and had held that a list not certified was invalid, and after citing numerous authorities the Court holds that the Clerk was without authority to make a deed because the list filed by the County Trustee did

not comply with the statute. Certiorari denied 215 U. S. 596, 54 L. Ed. 342.

The Illinois Court in *Glos vs. Cass*, 230 Ill. 641, 82 N. E. 827, held that where the County Clerk's certificate to the delinquent tax list was dated as of a day other than the day advertised for sale, the sale and the deed based thereon were void.

All these cases, and those which follow, clearly show that if the respondent had sued the County Treasurer and his surety for a failure to sell in 1932, 1933, and 1934, 1936 or 1938, that the failure of the City Auditor to certify the delinquencies to the County Auditor, so that the County Auditor could not, and did not, certify them to the County Treasurer, would have been a complete defense to such a suit.

The bondholders, under the pledge of full faith and credit clauses to collect, were entitled to a certificate from the City that would have given a good title to a purchaser at a sale, and not a title that could be set aside in a lawsuit.

It may be argued that even though the 1935 sale was void, the City could still, at this late date, make a proper certification, upon which a valid sale could be made, but surely such a proceeding which could result in a tax deed and possession of the property by sometime in 1945, or ten years later than title and possession would have been obtained under a valid sale in 1932, would not be a valid defense here.

In each of the following cases it was held that the requirement of the statute that the proper city or county officer sign and date a certificate directed to the County Treasurer, or other tax collector, directing him to collect the tax or assessment, was mandatory; that no requirement of the statute can be disregarded; that the form required becomes substance; that the courts are not permitted to speculate as to whether a failure to observe or perform such steps

does or does not result in injury, and that the absence of such certification is a jurisdictional defect making any subsequent sale void:

Brady vs. Davis, 168 Cal. 259, 142 Pac. 45.

Dougery vs. Bettencourt, 214 Cal. 455, 6 Pac. (2d) 499.

Warden vs. Ratterree, 215 Cal. 215, 9 Pac. (2d) 215, 88 A. L. R. 1204.

Shipman vs. Forbes, 97 Cal. 572, 32 Pac. 599.

Cohn vs. Federal Construction Co., 171 Cal. 547, 153 Pac. 916.

Craig vs. People, 193 Ill. 199, 61 N. E. 1072.

Drennen vs. People, 222 Ill. 592, 78 N. E. 937.

Biggins Estate vs. People, 193 Ill. 601, 61 N. E. 1124.

Reynolds vs. Fisher, 43 Neb. 172, 61 N. W. 695.

Platte Valley Milling Co. vs. Malmsten, 79 Neb. 730, 113 N. W. 229, and 79 Neb. 735, 116 N. W. 962.

Huiskamp vs. Breen, 220 Iowa 29, 260 N. W. 70.

Thompson vs. Auditor General, 261 Mich. 624, 247 N. W. 360.

Brase vs. Miller, 195 N. Y. 204, 88 N. E. 369.

Bays vs. Trulson, 25 Ore. 109, 35 Pac. 26.

Peterson vs. Graham, 130 Ore. 290, 282 Pac. 1084.

City of Highlands vs. Johnson, 24 Colo. 371, 51 Pac. 1004.

Devine vs. Wilson, 63 W. Va. 409, 60 S. E. 351.

Plaster vs. Harman, 70 W. Va. 634, 74 S. E. 905.

White vs. Hidalgo County Water Improv. Dist., 6 S. W. (2d) 790.

Parker vs. Maccue, 54 R. I. 270, 172 Atl. 725.

Wildman vs. Enfield, 174 Ark. 1005, 298 S. W. 196.

Stade vs. Berg, 182 Ark. 118, 30 S. W. (2d) 211.

Morris vs. Card, 223 Ala. 254, 135 So. 340.

Craig vs. Swader, 225 Ala. 366, 143 So. 553.

Each of the purported certifications included interest to October 1st (R. 38-44, Finding No. 9, R. 63, f. 84), although the law only allowed interest to September 15th of each year. Chap. 187, S. L. 1929, amending Sec. 6402, 1919 Code of S. D.

Point 3. That Where There Has Been No Valid and Legal Certification of the Delinquent Installments, or the City Has Failed to Diligently Enforce Collection, the City Has Broken Its Pledge of Its Good Faith in the Collection of Such Special Assessments and Has Made Itself Liable for the Entire Amount of the Bonds, Principal and Interest.

The defense of damage without injury is not available to petitioner.

Petitioner has also attacked the method of proof followed in this case, and argues that only nominal damages could be recovered on this record. Respondent submitted proof in exact accordance with the theory on which the McLaughlin and the two Canton cases were decided, and as the McLaughlin case carefully considered the South Dakota laws, we believe that when we showed these breaches of duty on the part of the City that the correct measure of damage was the amount of principal and interest due on the bonds.

The precise question raised by petitioner in this case was raised by the City of McLaughlin, in point 2 of its motion for direction (p. 404, 75 F. 2d), and in its point 5 on appeal (p. 405, 75 F. 2d), and was disposed of on page 410, 75 F. 2d, by the statement:

> "Under the principles announced by the decisions of this Court and the statutes of South Dakota, as construed by the Supreme Court of that State, the plaintiff * * * was entitled to sue for damages for breach

of contract, the measure of his damage being the contract price, or, in this case, the amount due on the bonds, as held by the lower court." (Citing cases.)

The reasons for and the exact justice done by this rule, and the earlier cases upon which it was based, are so fully set out on page 410, and in *Grand Lodge vs. City of Bottineau*, 58 N. D. 740, 227 N. W. 363, and *Hauge vs. Des Moines*, 207 Iowa 1209, 224 N. W. 520; *Freese vs. City of Pierre*, 37 S. D. 433, 158 N. W. 1013, and *Coolsaet vs. City of Veblen*, 55 S. D. 485, 226 N. W. 726, among other cases therein cited in support of the rule, that we feel no citation from them would aid the Court.

In addition to the cases cited in the McLaughlin case, the following cases squarely sustain the judgment herein:

Tillmann Co. vs. City of Seaside, 145 Ore. 239, 25 Pac. (2d) 917.

Miller vs. City of Scottsbluff, 133 Neb. 547, 276 N. W. 158.

City of Cattletsburg vs. Trapp, 261 Ky. 347, 87 S. W. (2d) 621.

City of Cattletsburg vs. Citizens National Bank, 234 Ky. 120, 27 S. W. (2d) 662.

Pine vs. City of Scranton (Pa.), 184 Atl. 253.

Dennis vs. City of Willamina, 80 Ore. 486, 157 Pac. 799.

The Supreme Court in *New Orleans vs. Warner*, 175 U. S. 120, 44 L. Ed. 96, on pages 102 and 103, holds the city liable for failure to collect assessments, and uses the following language:

"But we think a decisive answer to the argument upon both these articles is found in the contract of June 7, 1876, wherein the city purchased of Van Norden the drainage plant, and contracted 'not to obstruct or im-

pede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by said parties thereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same.' In respect to this we adhere to the opinion pronounced by us when this case was first before this court, that the city in respect of this purchase acted voluntarily; that it was not, as had been held in the former case of *Peake vs. New Orleans,* 139 U. S. 342, 35 L. Ed. 131, 11 Sup. Ct. Rep. 541, with respect to other warrants a compulsory trustee, but a voluntary contractor; that as the fund was to be partly created by the performance of the city of a statutory duty, it could not deliberately abandon that duty, or take active steps to prevent the further creation of the fund, and then plead a prior issue of bonds as a reason for evading liability upon the warrants. As the city had paid for the property in warrants drawn upon a particular fund, it was under an implied obligation to do whatever was reasonable and fair to make that fund good. Certainly it could not so act as to prevent the fund being made good, and then require the vendor to look to the fund, and not to itself. The duty of the city to collect these assessments was affirmed in *State, Van Norden vs. New Orleans,* 27 La. Ann. 497. See also *Cumming vs. Brooklyn,* 11 Paige 596; *Atchison vs. Byrnes,* 22 Kan. 65."

That the respondent is entitled to recover both principal and interest due on all of the seventeen bonds up to date of trial, and that the judgment, including such amounts, is not erroneous by reason of the fact that six of these bonds had not matured on their face, appeared to the Court and to

respondent to be inescapably correct upon the principle of the McLaughlin and Canton cases, and the many cases cited therein.

Fundamentally it seems plain that when the City, prior to October 1st of each of the years of 1932 to 1936, at least, failed to certify the delinquent special assessments, that the City then became liable to pay the entire amount remaining unpaid on the bonds outstanding, and has remained so liable at all times since that time, subject to credit to it for the bonds paid and interest paid thereon.

It seems to us that any other theory would defeat the fundamental principles of this line of decisions and that the actual due date of the bonds is wholly immaterial where the suit is based upon a breach of the good faith covenant of the bond.

Point 4. That the Respondent Is Entitled to Recover Both Principal and Interest on All of the Bonds, Including Those Not Yet Due on Their Face, or, if Not so Entitled, Is Entitled to Judgment for All Principal and All Interest, and to a Declaratory Judgment That the City of Huron Is Directly and Primarily Liable for the Bonds Maturing November 1st, 1939 and 1940.

So that there might be no question but that the liability of the City of Huron was definitely determined, the respondent, after alleging all of the essential facts in his complaint, did in his prayer for relief (R. 13) pray and demand judgment for a declaration that the City of Huron is directly and primarily liable for the whole amount of principal and interest due on each of the seventeen bonds, and for judgment for the total amount of principal and interest, so that if either the District Court or this Court should disagree

with the respondent on his basic concept of his rights, that judgment could be entered for all principal and interest of past due bonds, interest to date on the unmatured bonds, and a binding declaration under the declaratory judgment act that the City of Huron was directly and primarily liable for the principal and interest to accrue in the future on the six bonds which had not matured on their face at the time of the commencement of this action.

It seems to us to be crystal clear that we had the right to combine these two prayers for relief, and that the utmost that the City could accomplish, if it succeeded in convincing this Court that the trial court and Circuit Court of Appeals were wrong, would be that the judgment be modified and be a full and complete judgment for all principal and all interest due and a binding declaration of liability as to the remaining bonds.

This would certainly do Huron no good. These bonds are drawing the legal rate of interest, six per cent per annum (R. 3), while it is a matter of common knowledge that judgment refunding bonds could be sold at from three to three and a half per cent, so that if such a modification were made it would not benefit the petitioner, and that being true, the Court should not be required to split any fine hairs in attempting to find that our relief should have been divided and a declaration made as to the last six bonds, three of which were due November 1st, 1939, and three of which will be due November 1st, 1940.

The rule which applies in suits against the United States of course applies generally to all municipalities, and the following statement from *Love vs. United States* (8 Cir.), 108 F. (2d) 43, is applicable:

> "In suits against the United States, the judgment of the court must necessarily be largely declaratory in its

nature, because the usual award of process or execution is inappropriate." (Citing numerous cases.)

The prayer in the alternative for a declaratory judgment is based upon all of the allegations of the complaint and is founded upon the declaratory judgment act, Section 400, Title 28, United States Judicial Code and Judiciary, reading as follows:

"(Judicial Code, Section 274d.) Declaratory judgments authorized; procedure. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

This proceeding is authorized by Rule 57 of the Federal Rules of Civil Procedure, and the fact that the respondent might have another remedy at a later date is wholly immaterial under the express provisions of Section 400, *supra,* and the decisions of the Courts.

See *Colorado Nat'l Bank vs. Bedford,* 84 L. Ed. Adv. Sheet 13, p. 730.

That the respondent had the absolute right to join this prayer for a declaratory judgment with his prayer for a general judgment appears to be plain from the language of the statute itself, and in our opinion is definitely settled by the decision in *Currin vs. Wallace,* 83 L. Ed. 441, 306 U. S. 11, where, on page 448 of the L. Ed., the Court said:

"The Circuit Court of Appeals found, and the record supports the finding, that there is an actual controversy

between plaintiffs and defendants entitling plaintiffs to invoke the declaratory judgment act. *Aetna Life Ins. Co. vs. Haycorth,* 300 U. S. 227, 81 L. Ed. 617, 108 A. L. R. 1000."

And by the Circuit Court of Appeals of the Eighth Circuit in *Penn Mut. Life Ins. Co. vs. Forcier,* 103 F. (2d) 166; *Columbia Nat. Ins. Co. vs. Folke,* 89 F. (2d) 261; and that of the Fourth Circuit in *Anderson vs. Aetna Life Ins. Co.,* 89 F. (2d) 345.

Notes, 87 *A. L. R.* 1205-1250.

Reply to Petitioner's Argument.

On pages 9-11, petitioner's brief, it is argued that the act of the County Treasurer in making a sale in 1935 should be accepted as an administrative construction of the act of certification, but the County Treasurer disregarded the certifications in 1932, 1933, 1936, 1937 and 1938, so it cannot be even contended that there was a settled administrative construction of this statute, so that what was said in *Badger vs. Hoidale* (C. C. A. 8th), 88 F. (2d) 208, and *U. S. vs. Madigan,* 300 U. S. 500, cited as authority for this statement, would not apply, and this question is definitely settled against petitioner in *Sanford vs. Commissioner of Internal Revenue,* Vol. 84, L. Ed., Advance Opinions, page 53, where it is said on page 59:

"Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision."

And again on page 61:

"If, as we have held, we may reject an established ad

ministrative practice when it conflicts with an earlier one, and is not supported by valid reasons, see *Burnet vs. Chicago Portrait Co.*, 285 U. S. 1, 76 L. Ed. 587, 52 S. Ct. 275. We should be equally free to reject the practice when it conflicts with our own decisions."

At page 18, petitioner's brief, Section 6756 of the Revised Code of 1919 is set out, and it is argued therefrom that no informality in the warrant from the County Auditor to the County Treasurer will vitiate the proceedings taken, but no authority is cited, and none could be cited, that the total failure of the County Auditor to certify because the City Auditor had not certified to him is a mere informality, and this section does not apply to special assessments.

Petitioner, on pages 24-25, has cited *City of Winner vs. Kelley* (C. C. A. 8th), 65 F. (2d) 955, and *Grand Lodge vs. Winner*, 63 S. D. 390, 259 N. W. 278, but these cases do not help it.

The first of these cases was considered in the McLaughlin case, 75 F. (2d), on page 405 thereof, and it expressly appears from the opinion in that case on page 957 of the 65 F. (2d) that:

> "The court found that the city auditor in each year from 1922 to 1931, inclusive, had certified to the county auditor the installments of the assessments which were delinquent, for the purpose of the delinquent special assessment tax sale. * * *"

And that:

> "The statutory scheme for the levy and collection of these assessments contemplates that the city auditor shall annually certify to the county auditor all delinquent assessments, and that the county auditor shall then certify these assessments to the county treasurer, who is required to advertise and offer for sale the par-

cels of land against which the assessments are imposed. Sections 6400, 6401, 6402, 6785, 6786, 6797 of South Dakota Rev. Code 1919."

And in the *Grand Lodge vs. Winner* case, 259 N. W. 278, the Court specifically found that the City Auditor certified to the County Auditor all the delinquent assessments, he in turn to certify these assessments to the County Treasurer, etc., and that the City, having done all that it was required to do, was not liable for a deficiency in funds collected out of the special assessments.

These two cases specifically show that the Court found that under the statutory scheme of collecting special assessments the City Auditor was required to certify them to the County Auditor, and the County Auditor to the County Treasurer, so in fact they fully support the respondent's position and not the petitioner's.

The line of cases cited by counsel as to the effect of a voidable sale have no bearing whatever in this case where the sale was wholly void, and all of the cases cited by counsel had been decided prior to the McLaughlin case, and no cases are cited that in any way impair the decision of the Court in the McLaughlin and Canton cases.

On page 39, petitioner's brief, Section 1966, Rev. Code of 1919, is set out, and was identical with Section 37.1801 of the 1939 Code, so that it has remained unchanged since statehood, and was in force when the Freese and Coolsaet cases were decided by the South Dakota Court, applying Section 1967, Rev. Code of 1919, now 37.1802, S. D. C. 1939, as well as when the McLaughlin and Canton cases were decided by the Eighth Circuit Court of Appeals, so that none of these decisions can be impaired by Section 1966.

It should be borne in mind that under our statutory plan

the special assessments are levied in the name of the City and always remain the property of the City, and that they are never assigned to the holder of this class of bond, and that the holder of this class of bond has no lien upon them, a distinction that will account for every decision that we have found, which appears to be contrary in any degree to the McLaughlin and Canton cases.

So these assessment certificates are still the property of the City of Huron, and if the petitioner's argument has any merit in it, then the City could not be hurt by this judgment, because it could still collect these special assessments, but the Courts have definitely said that the respondent did not need to go into the realm of speculation as to the value of the property upon which these certificates were a lien or the amount of the general taxes which had accumulated, where, as here, the City had breached the good faith covenant to collect, contained in its bond.

Peake vs. City of New Orleans, 139 U. S. 342, is cited from on page 37, petitioner's brief, but it was clearly distinguished from the case at bar, in *New Orleans vs. Warner,* 175 U. S. 120, on pages 103 and 104 of the 44 L. Ed.

The McLaughlin case was thoroughly considered by the Circuit Court of Appeals, and carefully reconsidered in the Canton cases; it is sound law; under it each of the defaults of the City Auditor of Huron for each of the years of 1932, 1933, 1934, 1935, 1936 and 1938 was a distinct breach of the good faith clause of the bond; and here we have the additional fact that by a change in the time for redemption, in 1933, from two to four years, the holders of these bonds were seriously damaged by the failure of a legal certification in 1932, which would have made a legal basis for certification by the County Auditor to the County Treasurer, and a valid sale by him in 1932.

We respectfully submit that the writ should not be granted.

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